

U.S. Department of Labor

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Issue date: 11Jan2002

In the Matter of

CARL STAMPER
Claimant

v.

GULF MARINE REPAIR CORP.
Employer
and
BANKERS' INSURANCE CO.
Carrier
and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Case No.: 1999-LHC-2379

OWCP NO.: 06-173262

APPEARANCES:

Mr. Ray Calafell, Jr., Attorney
For the Claimant, through November 12, 1999

Mr. David Barnett, Attorney
For the Claimant, after November 12, 1999
and at the hearing

Mr. John S. Smith, Attorney
For the Employer

BEFORE:

Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER

This case involves a claim by Mr. Carl Stamper for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended ("the Act"). The claim stems from a back injury Mr. Stamper received on March 15, 1997, as he attempted to remove himself from a tight space in the engine room of a tugboat. At the time of the accident, Mr. Stamper worked as an unskilled laborer for Gulf Marine Repair Corporation ("Gulf Marine"), a business that repairs and renovates tugboats, barges and small ships in Tampa, Florida. Pursuant to a Notice of Hearing, dated May 16, 2000

(ALJ 1),¹ I conducted a formal hearing in Tampa, Florida, on August 10, 2000, attended by Mr. Stamper, Mr. Barnett² and Mr. Smith.

Procedural History

On June 30, 1999, the attorney who then represented Mr. Stamper filed a pre-hearing statement concerning claims for disability benefits arising from the back injury of March 15, 1997. The District Director of the Office of Workers' Compensation Programs ("District Director") referred Mr. Stamper's case for a hearing to the Office of Administrative Law Judges ("OALJ") on July 23, 1999. Administrative Law Judge Jeffrey Tureck scheduled a hearing for November 15, 1999, in Tampa, Florida. However, when it appeared the parties had settled the case, Judge Tureck continued the hearing (ALJ 3). Subsequently, counsel for the Claimant withdrew from the case. Judge Tureck kept the case on his docket for the next three months while the Claimant attempted to obtain new counsel. Then, after the three month period, Judge Tureck returned the case to docketing for assignment of another hearing date (ALJ 3). Eventually, I conducted the hearing on August 10, 2000.

ISSUE³

The principal issue in this case is suitable alternative employment.

The Parties' Positions

Claimant

Mr. Stamper, 28, is unable to return to his usual job as a longshoreman because of a back injury he sustained while working for Gulf Marine on March 15, 1997. He cannot sit, stand or walk for more than one hour each in an eight-hour work day. In addition, he is permanently restricted to occasional bending, squatting, and climbing and from any crawling or lifting more than 20 pounds. Mr. Stamper reached maximum medical improvement on March 4, 1999. His average weekly wage was \$349.60.

Mr. Stamper's physical limitations have left him permanently and totally disabled. While Mr. Stamper has shown a desire to return to work, his job related injury, blindness in one eye and mental limitations make him unemployable. Although the Employer provided Mr. Stamper with post-accident employment, the job was sheltered employment the company created to avoid its obligations to pay benefits

¹The following notations appear in this decision to identify specific evidence and other documents: ALJ - Administrative Law Judge exhibit, TR - Transcript of hearing,, CX - Claimant exhibit, EX - Employer exhibit, and JX - Joint exhibits, ALJ - Administrative Law Judge, TR -Transcript.

²Mr. Calafell withdrew as Mr. Stamper's counsel as of November 12, 1999 (ALJ 4).

³According to counsel, the parties have resolved the issue of continued medical care.

under the Act. Employer has failed to show any suitable alternative employment, and its labor market survey is insufficient. Consequently, Mr. Stamper should receive permanent total disability compensation, with associated cost of living adjustments.

Employer

The Claimant has some residual earning capacity; consequently, he is not permanently and totally disabled. Mr. Stamper is exaggerating his symptoms and limiting his efforts to maintain and find employment, thereby adversely affecting his earning capacity. Further, he is only restricted to sitting or standing one hour continuously, and not cumulatively. Numerous appropriate positions exist that are within Mr. Stamper's physical and mental abilities. While Mr. Stamper did engage in a limited search for sedentary security job positions, his concerns about being able to afford licensing are unfounded as most employers will pay for the license and provide training. Further, his return to employment with Gulf Marine establishes his annual wage earning capacity as \$12,646.40. The positions offered to Mr. Stamper at Gulf Marine were good faith positions that were within his physical limitations. In the alternative, Employer has shown suitable alternative employment is available to the Claimant, demonstrating a post-accident annual earning capacity of \$14,022.00.

Preliminary Evidentiary Issue

At the August 2000 hearing, I granted the parties' joint motion to conduct post-hearing depositions of witnesses who were not available to testify before the hearing (ALJ 2, and TR, page 6). The parties deposed Dr. Williams on October 18, 2000. As part of his deposition, Dr. Williams submitted a rehabilitation report concerning Mr. Stamper. Following the deposition, Employer's counsel filed a motion to strike Dr. John M. Williams' post-hearing deposition (JX 5). The Claimant filed a response on November 1, 2000.

Employer's Motion

The Employer seeks to strike Dr. Williams' deposition testimony from the record because he utilized, in part, information developed after the close of the hearing. Initially, the parties intended to obtain the depositions of Dr. Cutler, Dr. DeWeese, and Dr. Williams (a labor market expert) prior to the hearing. But, when the witnesses became unavailable to testify prior to the hearing, the parties agreed to take post-hearing depositions. Dr. Williams post-hearing deposition testimony violates the spirit of that agreement because he based some of his conclusions based on post-hearing evidence, notably, his post-hearing examination of Mr. Stamper. Since the Employer's vocational expert had been available and testified at the hearing, she was not able to address the information developed by Dr. Williams after the close of the hearing.

Claimant's Response

The Claimant asks that the Employer's motion to strike Dr. Williams' testimony be denied. Asserting a lack of legal or factual basis for excluding the deposition, counsel notes the Employer failed to cite any case law that invalidates the witness' testimony on the grounds that he formed his conclusions after the hearing. Because the Claimant's rights under the Longshore Act are ongoing and perpetual, the actual dates that Dr. Williams met with the Claimant and formed his opinion are not material. Moreover, there is no evidence indicating that Dr. Williams' opinion changed or would have changed between the hearing and his deposition. The parties agreement to conduct post-hearing depositions placed no limitations or restrictions on the information Dr. Williams could use to reach a conclusion. Although the Claimant provided Dr. Williams with all available medical reports in May 2000, the medical information developed during Dr. Cutler's post-hearing deposition was not available until after the hearing. As a result, to develop a valid comprehensive conclusion concerning Mr. Stamper's employability, Dr. Williams appropriately reviewed Dr. Cutler's post-hearing testimony.

Discussion

Despite an initial favorable reaction to the Employer's equity complaint,⁴ I ultimately deny for two reasons the Employer's Motion to exclude Dr. Williams' post-hearing deposition from the record. First, when the parties agreed to post-hearing depositions, neither party asked for any type of limitation to be imposed. Since the parties agreed to post-hearing depositions of medical experts and a labor market expert, it was reasonably foreseeable that the Claimant's labor market expert might be called upon to consider all the medical evidence, including the additional post-hearing medical depositions. As a result any concern about the use of post-hearing medical information or other evaluations should have been raised at the hearing. Second, the Employer might still have an opportunity to redress any procedural unfairness through the modification process available under the Act. At the same time, I note that in the case before me, Employer's counsel has apparently chosen not to seek the admission of post-hearing evidence to rebut Dr. Williams' testimony.

Accordingly, my decision in this case is based on the testimony presented at the hearing, the depositions of Dr. Cutler (JX 3) and Dr. Williams (with the attached rehabilitation report) (JX 5), and the following documents admitted into evidence: JX 2; CX 1 to CX 3; and EX 1 to EX 3.⁵

⁴Specifically, the Employer's is being penalized because its labor market expert witness was available for the hearing and testified. As a result, she was able to consider only evidence in existence at the time of the hearing and not able to evaluate evidence developed post-hearing. On the other hand, the Claimant's labor expert, due to his unavailability pre-hearing, had the opportunity to consider both the evidence admitted at the hearing and the additional information developed during the post-hearing depositions.

⁵At the hearing, I informed the parties that I would not consider their joint pre-hearing statement, JX 1, as evidence (TR, page 9). Additionally, I left the record open for receipt of three depositions (TR, page 26). I have

(continued...)

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues before me.

For the Claimant - Sworn Testimony

Mr. Carl Stamper (TR, pages 30 to 78)

[Direct Examination] Mr. Stamper has resided in Riverview, Florida for the past 25 years. He attended school until the ninth grade, when he dropped out because of a learning disability. After leaving school, Mr. Stamper began a career as a laborer, holding a variety of jobs at golf course, a plant nursery, a construction company, and a steel company. After his mother helped him fill out the application since he can't read or spell very well, Mr. Stamper joined Gulf Marine in 1996 as dock laborer, working seven days a week. At Gulf Maine, he usually built platforms that housed ships while they were repaired on the dock. At other times, he accomplished any assigned task, including pumping out diesel fuel. His nickname at work was "Forrest Gump."

On March 15, 1997, while cleaning the bilge area of a tug boat's engine room, Mr. Stamper suffered a back injury. As he started to leave the bilge area, he became trapped between two pipes. In freeing himself from the pipes, Mr. Stamper heard a snap in his back. He stopped work and a physician came out to the dock to examine him. The doctor instructed him to go home and treat his back with rest, ice, and heat. When Mr. Stamper attempted to return to work on the following Monday, he was still experiencing great pain. After being sent to a clinic, Mr. Stamper passed a drug test, took some x-rays and received pain pills. He continued to work at Gulf Marine "sitting out at the gate doing nothing" for about a month after the accident until sometime in April.

Shortly after the accident, Mr. Stamper visited Dr. Goldsmith, a neurosurgeon, who believed Mr. Stamper had a back muscle problem. However, Mr. Stamper disagreed and asked for additional tests. An MRI revealed slipped discs. Dr. Goldsmith placed him on light duty but Mr. Stamper requested to see another physician. As a result, he saw Dr. O'Keene who felt that Mr. Stamper was too young for back surgery and recommended therapy as a means of treatment for the pain. About this time, Mr. Stamper experienced problems with his legs and tailbone. His legs would fall asleep and his feet would become numb. His tailbone was "hurting really bad."

⁵(...continued)

received Dr. Cutler's deposition (JX 3) and Dr. Williams' deposition (JX 5). JX 3 and JX 5 are admitted into evidence. However, on February 22, 2001, the parties informed me that due to scheduling difficulties, they decided not to accomplish the deposition of Dr. DeWeese which would have been marked JX 4 (ALJ 5). I also note that EX 2 includes a videotape.

Due to his continued back problems, Mr. Stamper next visited Dr. Fishman, another neurosurgeon, who thought surgery was necessary. Dr. Fishman performed the operation on September 30, 1997 to stop the slipped discs from pressing on the nerves in Mr. Stamper's back. Even after the back surgery, Mr. Stamper continued to experience pain in his left leg. So he went to another physician, Dr. Cutler who in 1998 performed another surgery on Mr. Stamper's back in an attempt to relieve the pressure caused by the slipped discs. Although the pain greatly subsided after this operation, the pain returned during a subsequent course of physical therapy. Dr. Cutler attributed the return of pain to scar tissue, ceased the physical therapy and referred Mr. Stamper to a pain management program. In this program, Dr. Gari prescribed several steroid shots and morphine to ease the pain. The physician also prescribed muscle relaxers and sleeping pills to help him rest.

Mr. Stamper did not work in 1998. Eventually, Dr. Cutler released him back to light duty work in 1999. According to Dr. Cutler, Mr. Stamper was to avoid walking for lengthy periods, standing, bending and not to lift over 25 pounds. Mr. Phil Ruben informed Mr. Stamper that light work was available. After passing a drug test, Mr. Stamper tried to work at Gulf Marine sweeping a bay and picking up trash. He had been offered light duty three days a week, eight hours a day, at \$7.16 an hour. But, Mr. Stamper experienced back and leg pain with that work because it involved standing and walking. Mr. Stamper lasted only about four hours before Mr. Ruben told him to go home.

When Mr. Stamper next returned to work, Mr. Ruben gave him a chair and put him in a guard shack that the company had previously used as a paint shed to sit for eight hours a day. He sat in the shack, which did not have a phone, water service, or windows eight hours a day, four days a week, at \$7.16 an hour. On some occasions, the "wind blew it over." As a guard at the back gate, he was required to stop unauthorized people who were "coming in that way." He was not equipped with any communications device. On average, Mr. Stamper saw four cars a day exiting the premises through the back gate. During this period, Gulf Marine also had a private security company but they were not at his gate. Most people entered through another gate and the parking lot was located near that other gate.

After his vehicle broke down, Mr. Stamper continued to come to work at Gulf Marine with the assistance of a neighbor. At that time, they put him in a tool room for about a week. Since he couldn't spell, he had a difficult time getting workers' names correct.

Just as he was returning to work with Gulf Marine, he had to replace a starter in his truck. With the help of his neighbor, he accomplished the repair because he did not have the money to pay for someone to repair it. The repairs were physically difficult, but he feared losing his job if he did not have transportation. Mr. Stamper, who lives alone, tries to do most of the household activities himself. However, he is unable to mow his lawn because of the pain caused by the vibration of the lawn mower. Either his brother or father mow the lawn for him.

Gulf Marine laid Mr. Stamper off in March or April of 2000 along with numerous other employees. Since the layoff, Mr. Stamper has made efforts to obtain employment with the assistance of his neighbor,

who reads for him. Mr. Stamper has kept a record of the jobs for which he has applied to fulfill a requirement to obtain his unemployment checks. He has pursued about 40 jobs as a security guard in newspaper advertisements, made calls, and went to two interviews. Mr. Stamper lacks the required license to be a guard. He also has a driving restriction because he is blind in his left eye, which requires that he have side mirrors when he drives. The company has not rehired Mr. Stamper, nor has it offered Mr. Stamper any assistance with finding work.

[Cross Examination] Mr. Stamper testified that he could not afford the license required to be a guard in Florida. In addition, some of the guard positions were not available to him because he could not read or write. If all he was required to do was sit and watch the place he was guarding, Mr. Stamper could work as a guard.

Mr. Stamper has a problem with sitting for too long, because his feet fall asleep. He generally has no problems with his upper body and neck. Mr. Stamper believes he could drive a dump truck, so long as it had an automatic transmission. He had a Toyota pickup but using the clutch was difficult and painful. He can't afford a car with an automatic transmission. Mr. Stamper cannot drive with a standard transmission because his feet fall asleep. He cannot drive a semi-truck because he could not climb into the cab. Mr. Stamper loves working. He tried and completed every task that Gulf Marine offered him, but with great pain.

Mr. Stamper is currently taking morphine, muscle relaxants, and sleeping pills when necessary. He has been blind in one eye since the third grade. His current pain is at the same level it was prior to his surgeries and treatment. He experiences pain in his back, tail bone and legs. Mr. Stamper is not currently receiving treatment, and the medication he currently takes is left over from his prior treatment.

Mr. Stamper did not receive any job information or a labor market survey from either Gulf Marine or its lawyer.

Mr. Stamper was not aware that the insurer had offered another treating physician. CX 3 is a list of the jobs Mr. Stamper called about. His neighbor helped him write the list.

Mr. Edgar Stamper (TR, pages 78 to 88)

[Direct Examination] Mr. Edgar Stamper is Mr. Carl Stamper's brother. He sees his brother about two times a week. Before his accident, Mr. Carl Stamper was active. For example, he ran track in junior high school. He repaired his car, and was mechanically inclined. In addition, his brother was "outgoing and very sociable." He would play pool and bowl. Now, his level of activities has severely decreased. Mr. Carl Stamper can no longer perform the leisure activities he once enjoyed because he can't walk or stand very long or even sit on a stool.

Although his brother does most of his own household duties, he cannot perform heavy tasks such as mowing the lawn or raking leaves off his porch. Instead, Mr. Edgar Stamper performs those tasks for his brother. Mr. Carl Stamper is often depressed about not being able to work, afford social activities, or support a family.

Mr. Carl Stamper dropped out of school because of difficulty learning. He is virtually illiterate. Capable of reading only small words and numbers, Mr. Carl Stamper cannot write, spell, or understand most of the words in a paragraph. That's why a neighbor reads his mail to him and helps with the job search. Likewise, his vocational skills are also extremely limited. Since high school, he has performed jobs as a laborer and always been a reliable and on-time worker. He cannot use computers or other office machines.

[Cross Examination] Mr. Carl Stamper can learn how to perform tasks, such as repairing automobiles, by watching others as they work. He does at least some of his own grocery shopping and tries to keep his house neat. His brother does not receive aid from a nurse.

[Redirect Examination] His brother's quality of life and mentality have decreased significantly. He doesn't have anything to look forward to, and lives in pain.

Mrs. Rose Eileen Stamper (TR, pages 88 to 92)

[Direct Examination] Mrs. Stamper is Mr. Carl Stamper's mother. She visits him every two or three months. In second grade, he was identified as a slow learner and they discovered that he was essentially blind in his left eye. Carl did not complete school because it was too hard for him. He does not do either reading or math very well. He maintains his residence as best he can.

After leaving school, Carl became a reliable manual laborer. She can tell from his looks and actions that since the accident, Carl has not felt very well. He has expressed complaints about pain in his back and legs. He takes medication.

For the Claimant - Documentary Evidence

Deposition of Ms. Valerie Haschak (CX 1)⁶

Ms. Haschak is employed by Bankers Insurance Company ("Bankers") as a claims manager for workers' compensation. Licensed in Florida since 1985, she has worked longshore compensation claims since 1995. After some other adjusters left the company, Ms. Haschak took over Mr. Stamper's case.

⁶In her deposition, Ms. Haschak refers to a labor market survey. Rather than as an attachment to her deposition, that labor market survey appears in the record before me as EX 2 (See TR, page 20).

At that time, in addition to supervising the claim since his accident, Ms. Haschak for the last six months has also assumed the day-to-day responsibilities associated with his claim.

Mr. Stamper suffered back and leg pain and been diagnosed with disk herniations. Dr. Cutler placed Mr. Stamper at maximum medical improvement in March 1999. Following the back surgery, Dr. Cutler opined Mr. Stamper had a 9% permanent whole body impairment. The insurance company has used an average weekly compensation rate of \$200.27. While Ms. Haschak would normally take overtime into account in calculating an average weekly wage, she was unaware of the assertion that Mr. Stamper's job involved an average of two days of overtime per month. Ms. Haschak did not believe that Mr. Stamper had undergone a functional capacities evaluation. Bankers would not request a functional capacities evaluation on its own, but would rely on a doctor to request one.

When Mr. Stamper returned to light duty at Gulf Marine, he was paid temporary partial benefits. The amount of benefits was determined weekly, based on Mr. Stamper's actual earnings. Bankers would pay two-thirds of the difference if there was a loss in earnings. Gulf Marine did not have enough work for many workers and they were only able to accommodate Mr. Stamper for about 32 hours per week. When Gulf Marine did not have work for Mr. Stamper, Bankers would pay the full disability compensation rate. Bankers hired CorVel to conduct labor market surveys. Based on the surveys, Bankers believes that Mr. Stamper can return to the labor market and earn his pre-injury average weekly wage. Ms. Haschak acknowledged that no physician associated with this case had reviewed the labor market surveys. Bankers had continued to pay Mr. Stamper, awaiting approval by a doctor of the positions listed in the labor market surveys. They have been unable to get any medical response relating to the jobs produced by the surveys. There are jobs within the market survey that are at or above Mr. Stampers pre-injury average weekly wage.

Ms. Haschak believed that Mr. Stamper had completed some high school, and may have received a GED, but wasn't sure. She was aware of a vision impairment and that Mr. Stamper was illiterate. She believes that he has filed for Social Security Benefits, but did not know that he had been awarded benefits. The light duty positions provided by Gulf Marine were approved by Dr. Cutler. Bankers coordinates with Mr. Phil Ruben, safety director for Gulf Marine, and Dr. Cutler to determine what work would be available to someone in Mr. Stamper's situation. Ms. Haschak knew that periods of slow business have led to layoffs at Gulf Marine, but did not know if Mr. Stamper was the only light duty employee laid off. While Mr. Stamper does not have a treating physician, Bankers has authorized him to see a Dr. Batas, but hasn't been cleared to set up any appointments. Bankers had taken a recorded statement by Mr. Stamper.

Deposition of Mr. Thomas Strickland (CX 2)

Mr. Thomas Strickland is the personnel director for Gulf Marine, a company that repairs and overhauls, tugboats, barges, and small ships. He personally hired Mr. Stamper on January 20, 1997 for a job that had no qualifications. His hourly wage was \$7.60 and he worked an eight hour day. Occasionally, Mr. Stamper worked weekends. If he worked more than forty hours in a week, he was

given one and a half times his pay for that extra time.

After the accident, Mr. Stamper worked roughly two months during the later part of 1997, but did not work in 1998. Mr. Stamper returned to work at Gulf Marine on March 29, 1999, and worked intermittently until March 9, 2000. In 1999, Mr. Stamper earned \$6,173.

While Gulf Marine did advertise for open jobs, it was generally for skilled craftsman positions only. The guard position Mr. Stamper filled at Gulf Marine had been performed by another light duty employee in the past. The company did not advertise the position when it was unfilled. As a security guard at Gulf Marine, Mr. Stamper was not given a uniform, nor made an agent of the private security company. Mr. Stamper was paid at the same rate he was paid prior to his injury. According to Mr. Strickland, an injured employee returning to light duty as a gate guard would receive his pre-injury wage. The job essentially requires someone to just sit at the gate, stop unauthorized people and either "log people in and out" or direct them to the front gate security office. The guard shack was not air-conditioned and it was located within 60 feet of a telephone. Gulf Marine used the light duty guard position for accommodation - to keep an injured employee in pay status with the company. This practice enabled injured employees to earn some wages and continue to accrue benefits. Mr. Stamper accrued some benefits while employed with Gulf Marine, including a vacation, a personal day, and birthday pay. While Mr. Stamper became eligible for health insurance, he never enrolled. Light duty employees do not work overtime at Gulf Marine.

Gulf Marine never performed an ergonomic study to determine the physical requirements of the guard position. Mr. Stamper was stationed in an open air structure, where he would redirect visitors to the main entrance. He usually worked four days a week, with Bankers paying for the fifth day. Gulf Marine allowed Mr. Stamper to choose which four days he wanted to work. The decision to limit Mr. Stamper to four days of work per week was made by safety director Phil Ruben and Bankers. Mr. Ruben would keep track of the days Mr. Stamper missed. If Mr. Stamper missed work during the weekly four day schedule, Bankers paid the difference in workers compensation.

On March 9, 2000, Mr. Stamper was released by the company due to a downturn in business. About twenty employees, both skilled and unskilled, were laid off. The company usually employed 160 workers, so about 10% of the workforce was released. The need for Mr. Stamper's position diminished because there was less traffic entering through his gate. The other major position for light duty employees is in the tool room, but Mr. Stamper would have been unable to perform that position due its lifting and walking requirements.

Florida Department of Labor Unemployment Compensation Work Search Record (CX 3)

The Claimant submitted a worksheet that recorded any income he received since the layoff at Gulf Marine and that listed the jobs he pursued from April 26, 2000 to July 3, 2000 (CX3). The form, dated July 6, 2000, states that the Florida Division of Unemployment Compensation's requires an applicant to report any income obtained after the layoff and describe his efforts to obtain employment. The worksheet

indicates that Mr. Stamper did not work while he received unemployment benefits. During this period, he inquired about 21 jobs, primarily through phone calls and two interviews. All of the positions Mr. Stamper sought were security jobs. In almost every case, the Claimant stated that he did not obtain the job because he did not have a Class D security license.

For the Employer - Sworn Testimony

Mr. Philip Ruben (TR, page 95 to 112)

[Direct Examination] Mr. Ruben has been the safety director at Gulf Marine for 13 years. Prior to that position, he was the assistant director of safety for five years. Mr. Ruben is responsible for ensuring that the company complies with safety, emergency response and environmental guidelines promulgated by governmental regulatory agencies. He has the rank of a yard superintendent in the corporate structure. Gulf Marine repairs and maintains ships. He verified Mr. Stamper's description of his job before the accident.

Due to the nature of their business, Mr. Ruben had to create light duty positions for Mr. Stamper that did not surpass his limitations and would help avoid re-injury. Mr. Stamper's back injury limited his work as far as climbing, bending, lifting and walking. Mr. Ruben relied upon those medical limitations, as well as Mr. Stamper's own statements about what he could or could not do, in determining which positions were appropriate.

On Mr. Stamper's first day back, Mr. Ruben placed him in the machine shop for clean-up duty. But within an hour, Mr. Stamper returned indicating he couldn't do the work. So, Mr. Ruben sent him home. Later, the company called Mr. Stamper back to work and tried to find other jobs. One such task involved painting a pipeline, which Mr. Stamper completed. Eventually, Mr. Ruben created the gate guard position. It had not been manned before, but Mr. Ruben believed Mr. Stamper could sit there and redirect traffic and individuals to the company's front gate. Due to Mr. Stamper's writing problems, Mr. Ruben eliminated the log-in function of the gate guard duty. Mr. Ruben had considered Mr. Stamper for a tool room job but decided against it due to his reading and writing difficulties.

The company created the guard position as part of its ardent efforts to keep Mr. Stamper in the workforce without violating his medical restrictions. Mr. Stamper was allowed to stand, sit or rest as needed during the performance of his duties. Mr. Stamper complained of pain and discomfort, no matter what position was given to him. The company anticipated giving Mr. Stamper other jobs to do as he recovered from his injury. This goal was frustrated by Mr. Stamper's constant complaints about his limitations.

Mr. Stamper was laid off as part of a fifty percent reduction in the company's workforce. The company had experienced an economic downturn, and is still recovering.

[Cross Examination] Mr. Stamper did make an effort to accomplish every assigned task. Mr. Ruben agrees with the proposition that Mr. Stamper is illiterate. The guard shed where Mr. Stamper was stationed was erected purely for his use. The position was meant to be temporary work. The position was not advertised, and was created purely for Mr. Stamper. Gulf Marine had already contracted another company to provide security services for the facility. Mr. Ruben became aware of the medical restrictions on Mr. Stamper from Bankers' Insurance, and does not recall whether he actually saw any of the doctor's recommendations. Mr. Stamper was restricted to lifting no more than 25 pounds, and not standing or sitting for more than 15 minutes. As a general rule, the company will try and create light duty work to accommodate injured workers. Mr. Stamper was given four days of work per week, for a total of 32 hours, and the insurance company paid for the fifth day. This arrangement met the employer's insurance contract requirement of providing Mr. Stamper with sixty-six and two thirds of his pay.

[Redirect Examination] Mr. Ruben relied on Mr. Stamper's complaints in deciding which positions to assign him.

Ms. Teresa Manning (TR, pages 113 to 150) ⁷

[Direct Examination] Ms. Manning is manager of the Tampa branch of CorVel Corp., which provides managed care and vocational services for people who have been injured. Ms. Manning, who is also a case manager, has a master's degree in counseling and a bachelor's degree in social work. She is a certified vocational specialist and disability management specialist and is certified to perform such work in Longshore and Social Security disability cases. Ms. Manning has worked in the industry since 1977, performing vocational assessments for such clients as the Department of Labor, private insurance companies and claimants.

Ms. Manning became involved in Mr. Stamper's case when the Employer asked her to produce labor market surveys concerning Mr. Stamper's employment opportunities. Consequently, she prepared four reports between August 30, 1999 and January 3, 2000 (EX 2).⁸ In preparing the first survey, she read Mr. Stamper's statement and obtained information about Mr. Stamper's job restrictions, education and interests. She also reviewed medical documents to determine if there were any return-to-work advisements.

Next, Ms. Manning created a profile which involved analyzing Mr. Stamper's work history and a determination of his skill level. According to her analysis, Mr. Stamper was an unskilled to semi-skilled level three (the lowest ranking of semi-skilled work) employee. As this type of an employee, Mr. Stamper

⁷Over Mr. Barnett's objection, I accepted Ms. Manning as a vocational expert. See also Ms. Manning's resume (EX 3).

⁸Ms. Manning stated her last of four surveys was dated January 3, 2000. The last of four surveys in EX 2 is dated December 22, 1999 but carries a fax transmission date of January 3, 2000.

is expected to be taught through more than a brief demonstration up to three months' training. Such jobs may require reading simple words and sentences. Unskilled jobs are similar to level-3, semi-skilled jobs but require less training and skills. The reading requirement was on the GED level. Mr. Stamper's skill profile was 2-1-1 for reasoning, math and language, where one is the lowest on a scale from one to six.

Third, Ms. Manning considered Mr. Stamper's work standards and tolerances, along with his medical restrictions. Ms. Manning considered that Mr. Stamper had a ninth-grade education but had limited language skills, was accustomed to performing routine, repetitive, short-cycle work, and carried medical restrictions that limited him to sedentary, light-duty work. These factors were used as the profile for completing the survey.

As her next step, Ms. Manning assessed the job listings at Job Services of Florida in consideration of Mr. Stamper's profile. She evaluated jobs located in Hillsborough, Pinellas and Pasco Counties and eliminated positions that had an education requirement, work experience requirements without a willingness to train, or carried excessive physical requirements. The resulting survey did not contain the names, addresses, or phone numbers of the companies offering the jobs. However, an actual job seeker could get the remaining information from Job Services by presenting the reference number for the position.

Her surveys identified numerous jobs, such as: (1) a street sweeper operator, \$19,500; (2) delivery driver taking cleaning supplies to car dealerships, \$15,600; (3) parking garage cashier, \$13,000; (4) a security guard, \$14,550 (5) operator of a machine constructing boxes, \$14,560 up to \$22,880; (6) food assembly line worker, \$12,480; (7) solderer, \$13,382; and (8) sedentary, security monitor, \$14,560. Not only were those jobs available during the five-month job survey, Ms. Manning believed, based on a brief subsequent review, that some of the positions remained vacant.

[Cross Examination] Ms. Manning reviewed Dr. Cutler's letter containing the Claimant's medical restrictions, an independent medical examination report by Dr. DeWeese, and a statement by Mr. Stamper before developing an employment profile for the Claimant. However, she did not review Mr. Stamper's other medical records, or talk to his other doctors although some of them responded to her correspondences. The responses from those doctors did not include medical restrictions.

She did not receive a report from Dr. Cutler about Mr. Stamper's physical limitations, which stated that he could only stand, sit, or walk one hour per day (JX 2). Such information would have been useful. Additionally, Mr. Stamper was never subjected to a functional capabilities evaluation which would have been helpful. Ms. Manning did not know Mr. Stamper was practically illiterate, could barely spell and could not do math. She never spoke to him nor did the Employer ask her to meet with him. While she had read his recorded statement, she did not see a deposition. Ms. Manning reiterated that the job market survey did not discuss whether the positions were full- or part-time, how long they remained available nor did the survey include contact information about the employers. Therefore, she could not contact any of the employers. Even though the survey did not contain contact information about the vacancies, Mr. Stamper or any other job seeker could have pursued those positions by taking the job number from the

computer listing to a county Florida Job Services Office, where the job number would be matched to the identifying job information. Ms. Manning did not contact Mr. Stamper about the jobs on the labor market survey.

[Redirect Examination] Ms. Manning attempted to discuss the descriptions of the jobs contained in the survey with Dr. Cutler, however, he would not speak with her. She also attempted to discuss the jobs with Dr. DeWeese, but he referred her to Dr. Cutler.

[Recross Examination] Ms. Manning knew the Claimant had poor sight in his left eye, but she did not know that he was blind in that eye. She limited the guard positions in the survey to those where the employer would pay for licensure. Ms. Manning acknowledged that Florida Job Services was not the only sources of job listings. A job seeker could also read newspaper advertisements, call employers and go to businesses directly.

[Further Redirect Examination] The Florida Job Services offices are located in the same place where one would go for unemployment compensation. While Ms. Manning did not know the extent of Mr. Stamper's left-eye impairment, she did take poor eyesight into account in preparing the surveys.

For the Employer - Documentary Evidence

Wage Statements (EX 1)

A wage statement, dated June 21, 2000, indicates Mr. Stamper earned a total of \$2,282 from January 2, 2000 through March 12, 2000. A second wage statement, dated June 21, 2000, shows a total earned income for 1999 of \$6,169.

Multiple Labor Market Surveys (EX 2)

At the end of July 1999, CorVel Corporation and Ms. Theresa Manning were commissioned to conduct a labor market survey concerning Mr. Stamper's employability. In the first survey dated August 30, 1999, Ms. Manning indicates that she established a "baseline" for Mr. Stamper using information from Dr. Cutler, Dr. DeWeese, and Mr. Stamper. She determined that Mr. Stamper had a 9th grade education, poor eyesight in the left eye, and a prior work history of unskilled and semiskilled labor as a sand blaster. She characterized his vocational profile as "sedentary to light, unskilled to lower level semi-skilled work with an employer who does not require HS/GED and is willing to train if necessary." Ms. Manning also noted that Mr. Stamper had a 9% impairment rating due to recurrent lumbar disc herniation and had been placed in a light work classification on March 4, 1999. Within these vocational parameters, Ms. Manning identified in the local area with an average hourly wage of \$6.41. The job positions included: cashier, dietary aide, production worker, poultry cutter, sander, ticket taker, telephone researcher, counter worker, and shuttle/van driver.

A September 27, 1999 labor market survey identified many of the jobs previously mentioned and additional job opportunities consisting of: binder, order selector, assembler, security guard, team member, telemarketer, dish garden maker, fueller, golf cart attendant, and food preparation worker. The average hourly wage remained the same.

On October 20, 1999, Ms. Manning provided additional jobs including: packager, machine operator, attendant, room service clerk, and bowling center desk clerk. The average hourly salary was \$6.29.

A November 19, 1999 job survey revealed an average hourly wage of \$6.68 and identified further work opportunities as: line server, canvasser, mail sorter, packer/inspector, and customer service representative.

The last survey, dated December 22, 1999 set out additional jobs consisting of citrus processing worker and fire extinguisher tech trainee. The average hourly wage was \$6.53.

Surveillance Tape and Surveillance Summary (EX 2)

The Employer's second exhibit also contains a surveillance video (without audio) of Mr. Stamper on February 9 and February 12, 2001 with an accompanying summary of the observations from February 12th, conducted by Specialty Investigations Unlimited, Inc.⁹ The summary is essentially unremarkable except for a reference to Mr. Stamper lying on the ground underneath a truck apparently working on the vehicle.

Upon reviewing the tape, I observe Mr. Stamper walking, sitting, bending and crouching. At the start of the videotape, his movements on occasion are wooden and guarded. Though his gait appears normal, Mr. Stamper walks with his head slightly bent down. At 9:05 a.m. at a gas station, Mr. Stamper first bends forward at the waist without any expression of pain while standing next to the front of a car to examine the engine. Then in a effort to get his head in for a closer look, he bends further at the waist without reservation so that his back is parallel to the ground. He repeats this maneuver a couple of times and then bends even further to look down into the engine compartment. Mr. Stamper then raises up without any effort or pain expression. As he enters the front passenger seat of the car, Mr. Stamper slides in without any apparent effort or physical difficulty. From 9:10 a.m. to about 9:22 a.m. in front of an auto parts store, Mr. Stamper leans a couple of times behind another man as they both look into the engine compartment. Mr. Stamper also appears to ably discuss the car situation with the man inspecting the engine. Again, upon departure, he enters the car without difficulty. Later, while sitting at Burger King outdoor table smoking a cigarette, Mr. Stamper appears to carry on a normal and engaged conversation

⁹ Although the accompanying report indicates the video was taken on February 9 and February 12, 1999, the dates inscribed on the video segments are February 10, and February 12, 1999.

with a white-haired man. At 10:00 a.m upon leaving the Burger King parking lot, Mr. Stamper enters the car without any signs of difficulty.

At about 11:55 a.m., Mr. Stamper and the white-haired man are standing beside a pickup truck with the engine hood up. When he drops something onto the ground, Mr. Stamper bends over at the waist without reluctance to pick it up. On a couple more occasions, Mr. Stamper repeats the bending over action. He also reaches down and over to pet one of two dogs and is able to reach in through the truck's driver's side door to retrieve an item from the seat. Mr. Stamper and the other man depart at 12:12 p.m., return at 12:30 p.m., and park a car near the truck. At 12:35 p.m., Mr. Stamper appears to lie down on a blanket that's been placed on the ground and works under the truck. While working on an engine part placed in the truck's bed, Mr. Stamper props himself against the side of the truck. At 12:50 p.m., Mr. Stamper gets on his knees outside the driver's door, bends and reaches inside the cab. During this period, Mr. Stamper spends a cumulative period of several minutes bent over the side of the truck bed, with his chest resting on the top of the bed side while he works on something on the floor of the truck bed. He stops working around 1:00 p.m. Then, after a smoke break, they leave. At this point, Mr. Stamper is walking without any gait abnormality. After returning at 1:18 p.m., Mr. Stamper takes a small piece of equipment out of the car's truck, carries it to the truck flat bed, places a blanket back on the ground beside the truck, grabs the equipment from the truck bed and gets down on the blanket. For approximately ten minutes, Mr. Stamper is working on the truck lying on the blanket. After cleaning up, the truck repair is completed at about 1:40 p.m.

Although the film is grainy and, other than the scene at the gas station, does not clearly capture Mr. Stamper's facial expressions, his physical movements, other than the first few moments in the morning, appear fluid and are accomplished without hesitation or any overt sign of pain. For example, Mr. Stamper does not exhibit any other non-verbal signs of pain, such as holding his back.

Joint Documentary Evidence

Mr. Stamper's Medical Records (JX 2 and Attachment to JX 3)

This compilation of Mr. Stamper's extensive medical record and history concerning his back injury and subsequent back problems contains the reports of several physicians and physical therapists.

Dr. Stuart A. Goldsmith

April 15, 1997 - Mr. Stamper visited Dr. Goldsmith's office to receive treatment for a back injury he had sustained at work approximately one month earlier. Describing the accident, Mr. Stamper said his body had become lodged between two pipes, and that he "cracked his back" as he twisted out of the tight space. This was his first serious injury. He has had difficulty straightening his back since the work incident. His chief complaint was lower back pain, however the pain radiated down to his calves, which feel like they are going to "blow up." Mr. Stamper had already been treated at another medical facility, where a

physician placed him on light duty. Mr. Stamper had worked ever since the accident, but he said the work had not been limited to light duty. Mr. Stamper was taking muscle relaxers and pain medications.

Upon examination, Dr. Goldsmith found that all aspects of Mr. Stamper's back within acceptable limits. The alignment of his bones, the measurements of his hip and leg muscles, motor function, reflexes, and the sensory levels in his back were normal. Mr. Stamper moved his body without any apparent difficulty and could perform lateral bending, rotation to the left and right, extension, flexion, leg raises and a deep knee bend. Finally there was no tenderness in his thigh or calf muscle. The x-ray results also showed no abnormalities.

Based on the patient's history and the examination, Dr. Goldsmith diagnosed an acute lumbosacral sprain. He recommended that Mr. Stamper not return to work. However, as Mr. Stamper said he needed to continue working, the physician placed him on light-duty. He restricted Mr. Stamper to lifting no more than 10 pounds, abstaining from performing overhead work, and avoiding frequent pushing, pulling, stooping, bending, and climbing. Dr. Goldsmith prescribed physical therapy, advised continued use of pain medication and muscle relaxants, and scheduled a follow-up appointment.

April 29, 1997 - Dr. Goldsmith described the patient's progress as slow, and attributed the sluggish recovery to his employer's failure to follow the work restrictions. Therefore, Dr. Goldsmith amended the work restrictions to prohibit lifting and to perform only sedentary work.

May 15, 1997 - Although Mr. Stamper said his back still hurt, he felt better and his calves did not feel as if they were "locking up" or "going to explode." Dr. Goldsmith's examination revealed Mr. Stamper's condition had improved. The physical therapy center report stated that Mr. Stamper was not progressing as quickly as he should and that the therapy should continue, considering that he still had some decrease in range of motion and strength. However, Dr. Goldsmith believed the improvement that Mr. Stamper showed during the examination demonstrated that he no longer needed physical therapy. Although Mr. Stamper still did not believe he was well enough to return to full duty, Dr. Goldsmith released him to work without any restrictions. In fact, Dr. Goldsmith wrote on a job restrictions slip that Mr. Stamper could return to full duty. Mr. Stamper asked Dr. Goldsmith to perform an MRI on his back. The physician agreed that an MRI was appropriate and referred him to another facility to receive the test.

Dr. Robert Marshall

May 16, 1997 - Dr. Goldsmith referred Mr. Stamper to Dr. Marshall, who performed an MRI on the patient's back. Dr. Marshall's report stated that the MRI revealed: (1) disc degeneration at L4-5 and L5-S1 with desiccation of the disc and disc space narrowing particularly at L5-S1; (2) posterior paracentral disc herniations at the L4-5 and L5-S1 level; (3) impingement upon the thecal sac; (4) ligamentous and facet-joint hypertrophy particularly at L5-4; and, (5) spinal stenosis caused by a combination of the posterior, paracentral disc herniation, the ligamentous, and facet-joint hypertrophy.

Dr. John Okun and Dr. Jonathan Silverstein

June 17, 1997 - Mr. Stamper visited Dr. Okun for a second opinion after Dr. Goldsmith released him to full-duty. Dr. Okun reviewed the medical records of Mr. Stamper's visits with Dr. Goldsmith and Dr. Marshall, who conducted an MRI at the request of Dr. Goldsmith. Mr. Stamper described the accident that injured his back to Dr. Okun. Describing his condition, the patient said that back pain was 80 percent of the problem and leg pain was 20 percent. The leg pain was intermittent and shoots down both legs, but much more severe on the left than the right. Coughing, sneezing, lifting and strenuous activity worsen the pain. He also gets some tingling in his legs, feet and arms. The cramping in his calves has stopped. During his examination, Dr. Okun noticed that the patient's supine, straight leg raising was notable for hamstring tightness and discomfort. Seated, straight leg raising on the right caused a cross-leg phenomenon with the patient describing sciatica down the back of both legs into the sole of the foot.

Dr. Okun diagnosed Mr. Stamper with a possible congenital narrow canal with two herniated disks. However, the physician did not believe the patient's symptoms were caused directly by a herniated disk. He surmised Mr. Stamper might have some nerve root irritation and impingement exacerbated by his anatomy. Dr. Okun recommended that Mr. Stamper begin taking anti-inflammatories and Norflex and Ultram for pain. He also prescribed four weeks of intensive, physical therapy. Because there was no light-duty work available at Mr. Stamper's employment, Dr. Okun said the patient should refrain from working for one month. If Mr. Stamper had not improved in one month, the doctor would consider a myelogram and/or epidural steroids. Surgery may have also been necessary. However, because of the patient's young age, Dr. Okun wanted to avoid surgery.

July 24, 1997 - Dr. Okun referred Mr. Stamper to Dr. Silverstein for a lumbar myelogram and a CT scan of the lumbar spine. A lumbar myelogram revealed extradural defects at L4-5 and L5-S1, resulting in high-grade spinal stenosis and encroachment at the exiting nerve roots. A CT scan of the lumbar spine performed after the myelography demonstrated large central to left-sided extradural defects at L4-5, causing central spinal stenosis and left neural foraminal encroachment, (2) left-sided extradural defects at L5-S1 causing encroachment of the left L5-S1 neural foramen and (3) a laminectomy defect on the right at L5.

Dr. Robert J. Maddalon

August 11, 1997 - Mr. Stamper visited Dr. Maddalon to receive treatment for pain in his left leg. Reviewing the patient's history, Dr. Maddalon wrote that Mr. Stamper had already been in the care of Dr. Goldsmith, who prescribed physical therapy and light-duty work. Mr. Stamper continued working for about two months after his work accident in March 1997. In May 1997, Dr. Goldsmith ordered an MRI, which revealed HNP. Mr. Stamper requested a second opinion.

The results of Dr. Maddalon's physical examination of Mr. Stamper were normal except for mild, decreased range of motion in his back in all directions. X-rays revealed mild, decreased joint space at L5-

S1. An MRI report revealed HNP at L4-5 and at L5-S1 on the left. Those conditions were confirmed by a myelogram and a CT scan. Dr. Maddalon concluded that Mr. Stamper had not responded well to conservative treatment. Therefore, the physician: (1) told Mr. Stamper about the advantages and risks of a back surgery and asked him to call the office if he wished to proceed with the surgery; (2) showed the patient a video of a lumbar laminectomy; (3) asked Mr. Stamper to return in three weeks; and (4) discussed the option of simply learning to live with the pain, considering that Dr. Maddalon was not sure if Mr. Stamper would ever be able to perform heavy dock work again, whether or not he underwent surgery.

Physical Therapy Records

The case file contains Mr. Stamper's physical therapy records for his visits to Healthsouth from April 22, 23, 25, 28 and 29, 1997; from May 2, 6 and 8, 1997; June 19, 1997; and on December 16, 1997.¹⁰ He had been diagnosed with a lumbar sacral sprain. In addition to back pain, Mr. Stamper reported that his feet "went to sleep" and that he experienced "radiating" pain and numbness in his left leg, frequent cramping in his left calf at night, and tingling down both legs. He had weakness in his trunk and decreased flexibility in his left hip. The healthcare professionals prescribed exercises for the patient to perform during the sessions and at home. Mr. Stamper's therapy treatment plan included postural exercises/instruction, body mechanics instruction, flexibility exercises, back education and training, a strengthening program, functional stabilization training, and cardiovascular reconditioning. Therapists advised Mr. Stamper to maintain the correct posture when he sat, stood, exercised, and worked. Mr. Stamper received ice and heat treatments during the sessions, and the therapists recommended that Mr. Stamper put ice on areas that became sore at home. The patient's pain decreased with heat but increased when he was cold and when he performed activities, including the therapy exercises and when he bent too much at work. Consequently, the therapists told him that he should avoid bending at work. Mr. Stamper reported that the pain in his back and right leg decreased during the course of the sessions, but generally he had not "improved that much."

Dr. Larry Fishman

September 19, 1997 - Dr. Fishman recommended that Mr. Stamper undergo back surgery in a letter written to the Employer's insurer. Dr. Fishman described the details of Mr. Stamper's work-related accident and his continued reports of excruciating back pain, lower left extremity pain, and weakness since the accident. His symptoms increase with activity, including coughing, straining and sneezing. The patient said he had never experienced such symptoms until the accident. He has tried numerous types of conservative therapies to treat his back injury, but his symptoms persist. Dr. Fishman reviewed the results of Mr. Stamper's myelogram/CT scan and MRI scans. They revealed a large herniated disk at L4-5 and

¹⁰The case file also contains a prescription ordered by Dr. Cutler on September 1, 1998, for Mr. Stamper to undergo four weeks of physical therapy, three times a week. However, the records of those visits are not in evidence.

L5-S1 off to his left, symptomatic side. As Dr. Fishman examined Mr. Stamper, the patient's gait was "markedly antalgic," and he limped around the office. It was difficult for the physician to conduct a motor examination in the lower extremities because of the intensity of the patient's pain. The patient's reflexes were brisk and equal with the exception of a mildly diminished ankle reflex off to the left. His toes were down going. Sensation to the pinprick was diminished in an L5 and S1 dermatomal pattern on the left. He also had a positive, crossed, straight-leg raising test. Based on the above information, Dr. Fishman recommended that Mr. Stamper undergo a discectomy at L4-5 and 5-S1. Mr. Stamper agreed to comply as soon as possible. Finally, the doctor instructed the patient to stop taking anti-inflammatory medications at least a week before the surgery.

September 30, 1997 - Dr. Larry Fishman performed a micro lumbar discectomy at L4-5 and L5-S1 off to the left to repair a herniated disk in those areas. The physician said Mr. Stamper tolerated the procedure well and went into the recovery room in satisfactory condition.

October 10, 1997 - Dr. Fishman removed Mr. Stamper's sutures. The wound as well-healed; the patient was neurologically stable; and, he had a positive Homan's sign. Mr. Stamper reported that he was experiencing some pain in his left calf, although the calf was not tender to the palpation. Dr. Fishman recommended that Mr. Stamper take anti-inflammatory medications for minor aches and pains. The physician also referred the patient to the hospital to undergo an immediate ultrasound doppler of the left lower extremity to rule out deep vein thrombosis.

October 13, 1997 - Dr. Fishman noted that Mr. Stamper had undergone a venogram and an ultrasound of the lower extremities. The results of the procedure were vague,¹¹ but Dr. Fishman believed there was a "low-grade suspicion" for deep vein thrombosis. Dr. Fishman discussed this possible diagnosis with other physicians. Dr. Fishman called Mr. Stamper to check on his condition, and the patient said his calf was not hurting.

November 3, 1997 - Apparently at the request of Dr. Fishman, Dr. Stephen A. Stenzler performed a lumbar myelogram on Mr. Stamper's back. The myelogram revealed extradural defects at L4-5 and L5-S1 that could have been related to post-surgical scarring. Dr. Stenzler also saw an extradural defect at L3-4 which was probably due to a mild, annular bulging of the disc. Following the myelogram, Dr. Stenzler also performed a CT scan of the lumbar spine. The CT scan revealed an anterior extradural defect at L4-5, causing a narrowing of the spinal canal. Dr. Stenzler surmised that the condition could be caused by

¹¹On October 10, 1997, Dr. Rosenbach performed several tests. The x-ray of Mr. Stamper's left, lower extremities revealed no abnormalities. A left, lower-extremity test produced no definitive evidence for deep venous thrombosis. There was, however, incomplete filling of the lower leg vessels. The physician theorized the condition probably, but did not definitely, reflected the distribution of contrast within the venous structures, rather than legitimate, deep venous thrombosis. Finally, a doppler venous ultrasound evaluation of the left, lower extremity revealed a normal evaluation of the right, deep venous system from the inguinal region to the popliteal space without evidence for deep, venous thrombosis.

either scar formation or a recurrent disc herniation. The physician also found a left, paracentral soft tissue density at L5-S1, which he also theorized was caused by either scar formation or disc herniation.

November 7, 1997 - Dr. Fishman further elaborated upon the results of the myelogram and an undated CT scan after the patient's visit. The physician described the myelogram and CT as "grossly abnormal," and indicated the tests revealed a deficit at L4-5 off to the left. Dr. Fishman doubted that much of Mr. Stamper's condition was due to scar tissue. After noting that Mr. Stamper was not taking anything for pain, Dr. Fishman recommended an anti-inflammatory drug and advised Mr. Stamper to increase his activity. The surgical wound "looked fine," and there were no signs of infection. "He does not have any pain at all." Dr. Fishman did not recommend another surgery at that time, but he asked Mr. Stamper to return for another visit in two weeks to assess his progress, and his response to the medication. Dr. Fishman discussed the possibility of conducting an MRI, if Mr. Stamper's symptoms continued. Finally, Dr. Fishman said Mr. Stamper's neurological examination was normal, and he had excellent strength.

November 26, 1997 - Mr. Stamper's condition remained unchanged at the examination. There was some left, lower extremity pain and paresthesias. Dr. Fishman recommended that Mr. Stamper undergo an MRI scan to explore the possibility that he had a recurrent herniated disk.

December 5, 1997 - Apparently at the request of Dr. Fishman, Dr. James O. Cates conducted an MRI of Mr. Stamper's lumbar spine with and without contrast on December 5, 1997. After examining the MRI, Dr. Cates noticed surgical changes at L4-5 and L5-S1 and annular bulging at L3-4. However, he saw no recurrent disc herniation or spinal stenosis.

December 10, 1997 - Dr. Fishman discussed the results of an MRI of Mr. Stamper's back. The MRI was consistent with scar tissue at L4-5 and L5-S1, not recurrent disk abnormalities. The patient did not want to consider an additional surgery. Dr. Fishman advised that the patient might benefit from a selective, nerve root block and out-patient physical therapy. Mr. Stamper was not taking any pain medication, but his pain was a 5 on a scale of 1 to 10. Dr. Fishman described Mr. Stamper's condition as stable.

January 9, 1998 - Since his last visit, Mr. Stamper had undergone a nerve root block, but it did not help him. Also, he did not feel physical therapy had improved his condition. However, Dr. Fishman described Mr. Stamper as neurologically stable. Dr. Fishman reviewed all of Mr. Stamper's films again and theorized that the abnormalities in his back were scar tissue, but the physician was unsure. Dr. Foley had recommended that Mr. Stamper undergo two more nerve root blocks. Mr. Stamper was scheduled to visit Dr. Fishman again after undergoing those procedures.

February 20, 1998 - Dr. Fishman wrote that Mr. Stamper had undergone several nerve root blocks that were unsuccessful. And, Mr. Stamper did not wish to pursue those treatments again. Mr. Stamper continued to suffer from pain and was not working. However, Dr. Fishman described the patient's neurological condition as "stable." Dr. Fishman reviewed all of the patient's films again. It was

Dr. Fishman's understanding that radiologists believed that all of Mr. Stamper's abnormalities were caused by scar tissue. Dr. Fishman believed Mr. Stamper's condition at L4-5 was due to a combination of disk and scar tissue and that the damage at L5-S1 was probably caused solely by scar tissue. Dr. Fishman discussed the option of undergoing an additional surgery or being referred to a pain specialist.

Dr. Scott G. Cutler

April 16, 1998 - At the request of the Employer's insurer, Dr. Cutler wrote an opinion about whether Mr. Stamper should undergo an additional surgery on his back. Describing the patient's history, Dr. Cutler wrote that, in addition to undergoing back surgery, the patient had also completed physical therapy treatments and taken analgesics and anti-inflammatories. However, he still remained "incapacitated." Mr. Stamper reported that he was continuously miserable, because he could not sit down without "wincing in pain," had difficulty with moving or changing positions and had numbness in his feet. On several occasions, Dr. Fishman had suggested that Mr. Stamper undergo a second surgery to treat his symptoms, but Mr. Stamper was reluctant to go through the experience again.

During Dr. Cutler's examination of Mr. Stamper, he had a mild weakness of extensor hallucis function on the right. A sensory examination revealed a decrease in sensation to pinprick at L5 and at S1 distribution at the right and left. Straight-leg raising caused severe lower back pain bilaterally at only 10 degrees, with a positive Lesegue sign. Dr. Cutler reviewed Mr. Stamper's radiographic tests and found that a myelogram and an MRI scan conducted after Mr. Stamper's first surgery were consistent with persistent disc herniation at L4-5 centrally and probably a combination of scar and disc compression at L5-S1 on the left. The physician concluded that Mr. Stamper was suffering from residual disc herniation centrally at L4-5 predominately. Based on the examination and radiographic tests, Dr. Cutler recommended that Mr. Stamper undergo a second back surgery to remove the residual disc material at L4-5, and to explore L5-S1 for any recurrent disc herniation.

August 6, 1998 - Mr. Stamper agreed to undergo a second surgery on his back. Dr. Cutler discussed the planned surgery, which included a repeat discectomy at both L5-S1 and L4-5. Dr. Cutler advised him that a fusion procedure or internal fixation might be necessary if more bone had to be removed than expected to complete the surgery.

September 4, 1998 - Dr. Cutler performed surgery on Mr. Stamper's back to repair a recurrent disk herniation at L4-5, L5-S1 with joint overgrowth at L5-S1 left. Mr. Stamper was stable following the operation and that there were no complications. When the scar tissue around the nerve root was removed, and the nerve root was retracted, it was apparent that the L5-S1 joint was completely overgrown to the midline. Free disk material was removed, and the nerve root was completely decompressed. Fusion did not appear necessary at that time.

September 8, 1998 - Mr. Stamper was concerned that he had a surgical wound infection. Dr. Cutler found no evidence of such an infection. But because of Mr. Stamper's concern, the physician

advised Mr. Stamper to monitor the wound closely and to return for another visit within a week.

September 17, 1998 - Dr. Cutler re-examined Mr. Stamper's wound and removed the staples. The physician concluded that the wound was healing "nicely," and that it was not infected. Dr. Cutler advised the patient to limit his activities significantly over the next two weeks.

October 1, 1998 - Dr. Cutler remarked that Mr. Stamper was still having some pain around his sacrum, but other than that, he "seems to be doing reasonably well." The patient's wound was healing "nicely." The physician referred Mr. Stamper to Healthsouth for a course of physical therapy treatments.

November 4, 1998 - Mr. Stamper was doing "exceedingly well" and reported very few complaints, other than episodic pain in his coccygeal area. Dr. Cutler released him to return to work provided that he lift no more than 20 pounds and avoid bending.

December 10, 1998 - Mr. Stamper called and stated that when he stood up, he felt a pop in his back, his legs became numb and his feet turned purple.¹² As time passed the color and numbness improved, but the pain returned predominantly on the left side of his back, making him "miserable." During the office visit, Mr. Stamper appeared to ambulate normally, getting up and down of his chair without any evidence of pain. The surgical wound was clean and dry. However, Dr. Cutler ordered that an MRI of Mr. Stamper's back be conducted

December 16, 1998 - After a referral from Dr. Cutler, Dr. David R. Rabin performed an M-MRI lumbar base and contrast to determine the cause of pain in his left leg and buttock. The report stated that records of prior examinations, including radiographs or MR studies were unavailable for comparison. The instant examination revealed enhancing material in the laminectomy beds and in the lateral recesses on the left at both levels. That condition suggested the presence of scar tissue surrounding the nerve roots. Disc herniations at these levels were also enhanced centrally and slightly to the left, with more enhancement at L4-5 than at L5-S1. The procedure also demonstrated moderate to severe spinal stenosis at L4-5 and LS-S1 and a mild, broad disc bulge at L3-4.

December 22, 1998 - Mr. Stamper continued to complain of pain and numbness in his left leg.¹³ Dr. Cutler had reviewed the patient's MRI scan, which puzzled the doctor because of the significant stenosis at L4/5 despite repeat discectomy. Dr. Cutler was also perplexed because scar tissue that was anterior to the dural sac seemed to be primary cause of the stenosis. Before making any recommendations, Dr. Cutler planned to compare Mr. Stamper's pre-operative films to those produced after the surgeries.

¹² Dr. Cutler's report and prescription of December 10, 1998 was attached to his deposition of September 19, 2000. (JX 3).

¹³ Dr. Cutler's report of December 22, 1998 was attached to his deposition of September 19, 2000. (JX 3).

December 29, 1998 - In an effort to relieve Mr. Stamper's pain, Dr. Cutler referred the patient to Dr. Rodolfo Gari to receive a series of epidural steroid injections on the left at L4-5 and L5-S1.

January 18, 1999 - Ms. Valerie Haschak, a workers compensation claim manager for the Employer's insurer, asked Dr. Cutler to assess whether Mr. Stamper was able to return to work in a light-duty position. Dr. Cutler responded in a hand-written note on Ms. Haschak's letter that he could answer her question better after Mr. Stamper's epidural steroid injection treatments were completed.

February 16, 1999 - After Mr. Stamper's course of epidural steroid injection treatments, Dr. Cutler wrote the insurer that the patient said the pain radiating down his leg had not decreased. Dr. Cutler saw a significant "mass effect" in an area where a mass was removed during surgery. Typically epidural fibrosis does not create this amount of mass, but the MRI scan "clearly" looked like scar tissue. The physician prescribed a lumbar myelogram to investigate the cause of Mr. Stamper's symptoms, considering that none of the treatments that he had undergone had improved his condition.

February 25, 1999 - Dr. Cutler had reviewed a video of Mr. Stamper's activities performed earlier in the month. The doctor said the patient showed no pain behavior as he squatted, lifted, bent over an engine and as he got into and out of a vehicle in which he was a passenger. Despite the video, Dr. Cutler's still had a concern about his MRI scan that revealed a mass effect in his back and considered conducting a myelogram to determine the source of the mass effect. At the same time, since the mass effect did not appear to be impeding Mr. Stamper's activities, Dr. Cutler concluded Mr. Stamper could return to work, provided that he did not lift more than 25 pounds and that he could assume positions of comfort as needed.

March 11, 1999 - Mr. Stamper brought his myelogram to Dr. Cutler. The film revealed a bulging annulus or disc at L4-5. However, Dr. Cutler was still perplexed about the cause of the "plethora" of symptoms that Mr. Stamper said involved both legs, with weakness and collapsing. Mr. Stamper said he could do nothing other than lie flat. Consequently, he could not drive or stand, and he could not walk without limping and hunching forward. Dr. Cutler said the patient's complaints were "completely inconsistent" with a videotape of Mr. Stamper's activities. Although Dr. Cutler was concerned about the bulge on the myelogram CT, he was also "perplexed" over the patient's complaints when compared to his actions displayed on the video. The physician suggested that Mr. Stamper get an additional opinion from another neurologist.

March 25, 1999 - In a "Descriptive Restrictions Chart," Dr. Cutler described the conditions under which Mr. Stamper could return to work at Gulf Marine. Mr. Stamper's work restrictions allowed him to: (1) lift and carry up to 20 pounds continuously; (2) bend, squat and climb occasionally; (3) reach above shoulder level continuously; (4) grasp, push, and perform fine manipulations with both hands; (5) perform repetitive movements with both feet; and (6) to drive automotive equipment in moderation. Dr. Cutler wrote that Mr. Stamper could not: (1) sit, stand, or walk for more than 1 hour without a break; (2) lift or carry more than 20 pounds; (3) crawl; (4) perform activities involving unprotected heights, moving machinery, exposure to fumes and gases and exposure to marked changes in temperature and humidity;

or (5) drive a vehicle that does not have automatic transmission.

June 22, 1999 - Dr. Cutler informed the Employer's attorney that the Mr. Stamper had reached maximum medical improvement as of March 4, 1999. Mr. Stamper could perform light-duty work as of that date based on his examinations of the patient, his observations of the patient in a surveillance video, and a review of Dr. DeWeese's recommendations. Dr. Cutler concluded that the patient was permanently impaired by 9 percent based on the Florida Guide.¹⁴

Dr. Rodolfo Gari

January 5, 1999 - After a referral from Dr. Cutler on December 29, 1998, Mr. Stamper visited Dr. Gari for lower back pain that radiated to his left calf. Describing the patient's history, Dr. Gari reported that Mr. Stamper had suffered from the pain for 3 months. Mr. Stamper reported that the pain was intermittent, sharp, stabbing, aggravated by prolonged standing and had no discernable, alleviating factors. The patient also complained of numbness and weakness in both legs. Mr. Stamper had already undergone two lumbar laminectomies. He was not taking any pain medication. During the physical exam, Dr. Gari noticed that Mr. Stamper was not in acute distress, and he was alert and oriented. There was no clubbing, cyanosis or edema. Dr. Gari tested Mr. Stamper's range of motion; the strength in his biceps, triceps and hands; sensation, reflexes and his ability to raise and bend his legs. Radio diagnostic studies performed in December 1998 revealed epidural fibrosis at L4 to S1, HNP at L4-5 and L5-S1, stenosis at L4-5 and L5-S1, and mild muscle spasm in the lumbar area. Dr. Gari concluded that Mr. Stamper's lower back pain was caused by the conditions seen in the radio diagnostic studies. The physician scheduled Mr. Stamper to receive a steroid injection on January 12, 1999, with a follow-up appointment on January 15, 1999.

January 12, 1999 and January 15, 1999 - Dr. Gari performed the scheduled injection as well as an epidurogram. Mr. Stamper tolerated the procedures well, with no complications. In a January 15, 1999 follow-up visit, Mr. Stamper complained of shaking, weakness and pain in his left leg. Also, he was still experiencing pain on the left side of his back, and the pain radiated down to his left ankle.

Dr. William O. DeWeese

May 26, 1999 - Mr. Stamper visited Dr. DeWeese to receive an independent medical examination for back pain and bilateral leg pain. Reviewing the patient's history, Dr. DeWeese noted Mr. Stamper had undergone two lumbar laminectomies, with the more recent one being performed by Dr. Cutler in 1998. Mr. Stamper had not been able to return to his former position but was now working in a "desk job" at Gulf Marine. He described his condition as incapacitating and said he was unable to stand for more than 5 minutes or walk for more than a block without pain. He also said he could not perform any tasks that

¹⁴Dr. Cutler revised his rating of Mr. Stamper's disability rating based on the Florida guide from 9 percent to 8 percent in a deposition conducted September 19, 2000. The physician said he made the change because the Florida guide does not account for pain and suffering.

require bending, such as bending over the hood to change the oil in a car. Mr. Stamper reported that he had good improvement for several months after the second surgery. After the physical therapy stopped, the pain returned to a severe level. The patient was taking analgesics.

Most aspects of Mr. Stamper's neurological exam were normal, including his cranial nerves, motor strength, reflexes, sensation, coordination, gait, and the ability to perform straight leg raising, gastroc pushups and heel stands. A review of Mr. Stamper's back, after the myelogram performed July 24, 1997, revealed a small disc fragment at L4-5. However, Dr. DeWeese concluded that Mr. Stamper's back looked 90 percent better. Dr. DeWeese also studied a post-myelogram CT scan which showed a small amount of disc material present in front of the thecal sac at L4-5. The physician also concluded that his back appeared to be greatly improved since the scan performed in July 1997. Despite Mr. Stamper's recovery, Dr. DeWeese still found that the patient had a small amount of disc protrusion at L4-5. Based on Mr. Stamper's symptoms, the physician did not recommend a third surgery on the grounds that an additional operation would not return Mr. Stamper to a higher functional work status.

Deposition of Dr. Scott Cutler (JX 3)

[Direct Examination] In a September 19, 2000 deposition, board certified neurological surgeon Dr. Scott Cutler testified that he first examined Mr. Stamper on April 16, 1998. After receiving details of Mr. Stamper's accident and the medical background of his treatment, Dr. Cutler performed a clinical evaluation and reviewed the radiographic data. He found neurological impairments, and the radiographic data suggested a large central herniated disc at L4-5, and one at L5-S1. As result, Dr. Cutler recommended another surgery to remove the herniated disc at L4-5 and explore L5-S1.

After the surgery, and through physical therapy, Dr. Cutler felt that Mr. Stamper was progressing better than originally anticipated. After experiencing more pain, Mr. Stamper went for another MRI, which showed scar tissue causing stenosis. The narrowing of the nerve canal was still present because scar tissue had filled the space left by removal of the disc. Following visits to Dr. Gari for epidural steroid injections, Mr. Stamper returned to Dr. Cutler's office with absolutely no improvement in his pain. Dr. Cutler recommended a myelogram, which revealed some bulging at L4-5. However, the complaints of pain and discomfort from Mr. Stamper were far in excess of the results of the myelogram. Dr. Cutler then recommended a second opinion, which was scheduled with Dr. DeWeese. Dr. Cutler agreed with Dr. DeWeese's findings that Mr. Stamper did not require further surgery. Accordingly, Mr. Stamper could return to work with certain restrictions.

Dr. Cutler believed that Mr. Stamper had reached maximum medical improvement on March 4, 1999. He chose this day because it was six months after Mr. Stamper's last surgery. Previously, Dr. Cutler had opined that Mr. Stamper suffered a nine percent permanent impairment, based on the Florida guide. But now, Dr. Cutler testified that he had been mistaken, and the level of impairment was only eight percent. Although the Florida guide is not subject to interpretation, the level of impairment would have been much different under the AMA guidelines, which are subject to interpretation. Under the AMA

guidelines, if applicable to longshore proceedings, Dr. Cutler estimated that Mr. Stamper's impairment, would be between 13 and 15 percent. However, based on the videotape he was shown, Dr. Cutler would reduce Mr. Stamper's impairment to nine or ten percent.

Mr. Stamper clearly does not have a normal spine. He has undergone two back surgeries and will "have problems with his back, period." At the same time, Mr. Stamper's verbal assessment of his condition was totally inconsistent with his activities that Dr. Cutler observed on the videotape. Due to this inconsistency, Dr. Cutler chose to terminate his treatment of Mr. Stamper. A functional capacity evaluation would not be of help, because it would depend significantly on Mr. Stamper's cooperation.

When asked about specific positions and Mr. Stamper's ability to work in those positions, Dr. Cutler found a delivery driver job to be within the physical restrictions he placed on Mr. Stamper.¹⁵ Similarly, work as a parking garage cashier was within Mr. Stamper's physical restrictions. Mr. Stamper could also physically perform a position as a security guard, walking four to six hours around the property to be guarded. A machine operator position was acceptably within Dr. Cutler's restrictions. However, a position as a food assembler concerned Dr. Cutler, because he felt the position implicitly would not give Mr. Stamper the option of sitting or standing whenever he felt it necessary. In contrast, work as a solderer was acceptable because, while it was an assembly line job, the description stated that the employee could stand or sit. So long as the lifting restrictions are honored, any job which lets Mr. Stamper assume a standing or sitting position as needed for his comfort is acceptable.

[Cross Examination] Dr. Cutler acknowledged the jobs he reviewed did not contain an ergonomic analysis by the employer. However, an ergonomic analysis was not very meaningful for two main reasons. First, an ergonomic analysis is only useful if a supervisor chooses to follow it. Second, an ergonomic analysis may mean less to a neurosurgeon than real life situations. Dr. Cutler testified that he was unaware that Mr. Stamper was illiterate and could not do math. He was also unaware that Mr. Stamper is blind in one eye. Dr. Cutler's assessment of Mr. Stamper's ability to perform the various jobs listed did not take either Mr. Stamper's illiteracy or partial blindness into account. While Dr. Cutler could not remember exactly which drugs were prescribed to Mr. Stamper, he was sure that he would have prescribed some form of medication, based on Mr. Stamper having had surgery.

Dr. Cutler testified that Dr. Gari was providing Mr. Stamper with epidural injections, and possibly cortisone injections as well. Dr. Cutler was aware that, during this treatment, Mr. Stamper was working for Gulf Marine, though he didn't remember how many hours a week he was working. Actual knowledge of Mr. Stamper's work at Gulf Marine might have been significant in assessing Mr. Stamper's abilities, if he was undertaking activities inconsistent with Mr. Stamper's stated pain to Dr. Cutler.

¹⁵Due to lack of foundation and improper predicate, Mr. Barnett entered a "standing" objection to the questioning of Dr. Cutler about specific jobs. I over-rule those objections noting first that the formal rules of evidence are not applicable in longshore proceedings (see 29 C.F.R. §18.1101 (b) (2)). In addition, Dr. Cutler was well aware of Mr. Stamper's physical capabilities.

With regards to the surveillance video of Mr. Stamper, Dr. Cutler believed that the cortisone injections given by Dr. Gari would not have helped Mr. Stamper in those activities, because they had not helped him in the past. It was also unlikely that a codeine derivative would have made those activities possible either. What Dr. Cutler saw in the surveillance tape did not match what Mr. Stamper had been telling him in his office visits. The video led Dr. Cutler to conclude that Mr. Stamper's functional capability was higher than what he had previously believed. He used the videotape to set Mr. Stamper's physical restrictions and recommend his return to work.

Dr. Cutler stated that a functional capacity evaluation would not necessarily provide data sufficient to assess a person's capabilities or set limitations. First, the functional capacity evaluation does not take into account a physician's knowledge of the patient and the restrictions in place. Some of the functional capacity evaluation's recommendations could be invalidated on that basis. Second, a functional capacity evaluation requires full cooperation to be effective. Dr. Cutler was suspicious of the possible level of cooperation, based on his viewing of the surveillance tape. However, assuming valid cooperation and within a doctor's imposed restrictions, a functional capacity evaluation may be helpful.

Reasonably, Mr. Stamper may experience remissions and require an occasional follow up visit with a physician. However, Dr. Cutler has nothing further to offer Mr. Stamper. Mr. Stamper may be able to utilize a pain specialist, family doctor, or rehab doctor. Dr. Cutler could render an opinion on Mr. Stamper's level of impairment under the AMA guidelines, but it would be a subjective determination.

Deposition of Dr. John M. Williams (JX 5)

Dr. Williams, a board certified rehabilitation specialist, was deposed on October 18, 2000. He testified that a vocational assessment involves a determination of the person's functional capacity in terms of physical and mental abilities. It also involves consideration of the person's age, education, work history, acquired skills, adaptability, and the person's stated limitations. These factors are considered in light of the available jobs.

Dr. Williams reviewed all of Mr. Stamper's medical records, which he used in forming his opinions. From a medical standpoint, he relied primarily on Dr. Cutler's functional assessment in producing his analysis. According to Dr. Cutler, Mr. Stamper must have a sit and/or stand option and may perform a sedentary job which required no lifting. Dr. Williams also commented that Dr. Cutler's stand/sit/walk endurance restriction essentially limited Mr. Stamper to an hour of each activity each workday so that Mr. Stamper could only work three hours out of an eight hour day. On the other hand, Dr. Williams disagreed with Dr. Cutler's opinion that no ergonomic job analysis was required. Dr. Williams also considered the Social Security Administration's determination that Mr. Stamper was disabled and that the Agency was

issuing the claimant disability payments.¹⁶

Dr. Williams met with Mr. Stamper as part of the preparation of his report to assess his abilities and compare the interview observations with the written records. Dr. Williams first noticed Mr. Stamper's intellectual abilities would qualify him only for low-end semi-skilled work, and completely preclude him working in a skilled position. Mr. Stamper tested at a first grade reading level, and in the lowest two percent in the verbal portion of the standard intelligence test. Mr. Stamper has the ability to do highly repetitive, simple tasks as a laborer. His left-side blindness makes long-term commercial driving unrealistic. Similarly, a position involving dangerous machinery would be inappropriate.

Due to Mr. Stampers's educational deficits and physical limitations, Dr. Williams opined that the probability of Mr. Stamper being rehired was extremely low. In his professional opinion, Mr. Stamper is not going to be employed. He is mentally retarded, under both the Social Security and American Academy of Mental Deficiency standards. Likewise, his physical limitations render him essentially disabled. He is not adaptable to a work environment, and operates at a slow pace, which is common to mentally retarded individuals. A Commerce Department study found individuals limited to a full range of sedentary work, exclusive of other factors such as intelligence, were 67 percent less productive. This is because the jobs available to them tend to be part time, low paying, or undesirable.

Applying to be a laborer requires less of a application and screening process than sedentary jobs do, which is an advantage to someone with a lower mental aptitude. But, in an office or sedentary job setting, there is more focus on the job application. Ultimately, because he will be coming in and out of the labor market, Mr. Stamper may find periodic employment, with a yearly earning capacity of between \$3,714 and \$4,033.

Concerning the videotape, Dr. Williams stated that the exhibited behavior was not in any way significant to his assessment of Mr. Stamper's employability. Mr. Stamper is not purported to be crippled, and the tape only shows about one hour of activity and does nothing to suggest he would be able to continue such activities for a 40 hour week.

¹⁶The Employer's attorney objected to the portion of Dr. Williams' report that discussed Mr. Stamper's receipt of Social Security Administration disability benefits. Mr. Smith based his objection on the fact that Mr. Stamper had not submitted documents verifying the agency's disability determination. Consequently, Dr. Williams' discussion about the disability benefits was based on inadmissible hearsay evidence. Once again, I point out that the formal rules of evidence do not apply and I now overrule Mr. Smith's objection. When considering hearsay evidence during longshore proceedings, the sole question is whether the evidence is reliable. *See Richardson v. Perales*, 402 U.S. 389 (1971); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); and *Camarillo v. National Steel & Shipbuilding Co.*, 10 BRBS 54, 60 (1979). However, since disability under the Act is defined differently than the statutes administered by the Social Security Administration, that agency's determination has little bearing on the issue before me.

Dr. Williams felt that Ms. Manning had not considered enough material in developing her labor market surveys. In particular, she had not adequately considered the individual positions and their locations to determine if Mr. Stamper could perform them. For example, Mr. Stamper does not have the ability to be a cashier. Mr. Stamper would be unable to be a commercial delivery driver, because he lacks the ability to understand numerous sets of directions or adequately read street signs. He is unable to work as a security guard, because he lacks the requisite reading skill to pass the licensing test. Nor could he be a toll booth operator, because he is unable to work quickly or make change. He also has no experience working with people, so counter attendant is unacceptable. Essentially, Mr. Stamper is unable to perform any position which requires multiple activities. On the other hand, Mr. Stamper is capable of learning through training (however slowly).

[Cross Examination] Dr. Williams stated that Mr. Stamper's injury did not affect his intellectual abilities. While the depression over being unemployed may have had a mild impact on Mr. Stamper's function, it would not have been meaningful. He had never seen any documentation regarding Mr. Stamper's blindness, but felt that Mr. Stamper's accident-related limitations and intellectual deficiencies were more important. While Dr. Williams does rely on the truthfulness of his interviewees, he believes he has the ability to tell when he is being manipulated. He had not contacted any of the potential employers because he felt that Mr. Stamper had little chance of gaining employment. Mr. Stamper faces competition from immigrant workers for the one job in 20,000-25,000 that is sedentary.

[Redirect Examination] Dr. Williams testified that Mr. Stamper over-stated his intellectual abilities. But for his injury, Mr. Stamper could pursue laboring work, which is plentiful. The only work available to someone of Mr. Stamper's intellect is as a laborer. Unfortunately, the combination of his back injury, which now precludes heavy to medium effort laborer work, and low intelligence erodes his employment potential. Less than one tenth of one percent of jobs are available to Mr. Stamper.

Dr. Williams' Rehabilitation Assessment of Mr. Stamper (JX 5)

Dr. Williams presented his October 18, 2000 rehabilitation assessment of Mr. Carl Stamper as an attachment to his deposition (he covered most of the report's conclusions in his deposition testimony). Initially, as part of his evaluation, Dr. Williams conducted an extensive review of Mr. Stamper's medical record, Dr. Cutler's deposition, and the labor market surveys. Then, he interviewed Mr. Stamper and administered standardized tests which showed Mr. Stamper functioning at a low intellectual level with first grade reading skills. In addition, Mr. Stamper's perception is slow; he does not adapt very well, and he possesses limited verbal reasoning. The wage level for the low end semi-skilled job position is about \$5.46 to \$5.56 per hour.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

At the hearing, the parties stipulated to the following facts: a) An employer-employee relationship existed between Mr. Stamper and Gulf Marine at the time of Mr. Stamper's injury on March 15, 1997; b) The injury arose out of, and during, the course of Mr. Stamper's employment with Gulf Marine; c) Mr. Stamper notified the Employer of the injury in a timely manner; d) At the time of injury; Mr. Stamper's average weekly wage was \$349.60, which produces a weekly worker's compensation rate of \$233.08; and, e) Mr. Stamper reached maximum medical improvement on March 4, 1999 (TR, pages 11 to 18).

Mr. Stamper's Disability

Under the Act, a longshoreman's inability to work due to a work-related injury is addressed in terms of the nature of the disability (permanent or temporary) and the extent of the disability (total or partial). Since Mr. Stamper is seeking compensation for a work-related disability, he has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985).

Nature of Mr. Stamper's Disability

The nature of a disability, permanent or temporary, is typically defined by the date of maximum medical improvement ("MMI"). *Trask*, 17 BRBS at 60. A claimant reaches MMI when the injuries from the work-related accident have stabilized and no further improvement is anticipated. *Thompson v. Quinton Enterprise, Ltd.*, 14 BRBS 395, 401 (1981) and *Dixon v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent. *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1979). An irreversible condition is permanent per se. *Drake v. General Dynamics Corp., Elec. Boat Div.*, 11 BRBS 288, 290 n.2 (1979).

Based on the evidence in the record, the parties' stipulations, and the presumption under Section 20 (a) of the Act,¹⁷ Mr. Stamper suffered a work-related injury to his back on March 15, 1997. Over the course of nearly two years, Mr. Stamper underwent conservative therapy and subsequently two more drastic back surgeries to alleviate the pain and damage associated with the injury. However, some residual

¹⁷ If a claimant establishes the existence of an injury and the occurrence of a work-related accident that could have caused the injury, then the courts and Benefit Review Board have interpreted Section 20 (a) of the Act, 33 U.S.C. § 920 (a), to invoke a presumption on behalf of a claimant that, absent substantial evidence to the contrary, the injury was caused by the work-related accident. In Mr. Stamper's case, the evidence demonstrates that Mr. Stamper had an accident at work while exiting a tugboat's bilge on March 15, 1997 and he had a back injury.

pain and disc damage remained. In an independent medical evaluation in May 1999, Dr. DeWeese concluded that no additional surgery would improve Mr. Stamper's situation. Accordingly, the parties have stipulated, and Dr. Cutler opined, that Mr. Stamper reached MMI on March 4, 1999, six months after his second back surgery. Consequently, I find the nature of any disability Mr. Stamper may have in regards to his back injury stemming from the March 15, 1997 work-related accident is permanent.

Extent of Mr. Stamper's Disability

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128,131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (DC Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his pre-injury, regular, full-time employment. See *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity.

Determining the extent of a disability, and consequently whether an award of disability benefits is appropriate, involves a three step process. *SEACO and Signal Mutual Indemnity Assoc., Limited v. Bess*, 120 F. 3d 262 (4th Cir. 1997) (unpublished); see also *Newport News Shipbuilding & Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir.1988). The three steps are: (1) determination of a *prima facie* case of disability; (2) determination of suitable alternative employment; and, (3) determination of claimant's ultimate burden of proof that he remains unemployable.

Prima Facie Case of Permanent Total Disability

To establish a *prima facie* case of total disability, whether temporary or permanent in nature, a claimant has the initial burden of proof to show that he cannot return to his regular or usual employment due to work-related injuries. This evaluation of loss of wage earning capacity focuses both on the work that an injured employee is still able to perform and the availability of that type of work which he can do. *McBride*, 844 F. 2d at 798. At this initial stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). A claimant's credible testimony of considerable pain while performing work may be a sufficient basis for a disability compensation even though other evidence indicates the claimant has the capacity to do certain types of work. *Mijangos v. Avondale Shipping, Inc.*, 948 F. 2d 194 (8th Cir. 1999) and *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In addition, a physician's opinion that the employee's return to his usual or similar work would aggravate his condition may also be sufficient to support a finding of disability. *Case v. Washington Metro. Area Transt. Auth.*, 21 BRBS 248 (1988).

The Employer does not really contest that Mr. Stamper is physically unable to return to his pre-injury longshoreman work.¹⁸ At the time of, and prior to, the March 15, 1997 accident, Gulf Marine employed Mr. Stamper as a longshoreman laborer. In that capacity, he built repair platforms, pumped diesel fuel, and cleaned out the bilge areas of tugboats. The record contains little evidence of the physical effort associated with his pre-injury work. Implicitly, due to the typical physical effort associated with moving around ships as a dock laborer, Mr. Stamper's longshoreman work involved much more than light physical work. Notably, when Gulf Marine brought Mr. Stamper back to work with Dr. Cutler's light duty restrictions, which included no heavy lifting, no crawling, and only occasional climbing, they did not employ him in his former capacity as longshoreman laborer. Rather, the company sat him down outside a small shack at the back gate. As a result, I find the preponderance of the evidence establishes that due to his work-related back injury from the March 15, 1997 accident, Mr. Stamper is unable to return to his usual pre-injury longshoreman work or duty. Consequently, Mr. Stamper has established a *prima facie* case of total disability.

Suitable Alternative Employment

Turning to the central issue in this case, the next step in determining extent of disability addresses the question of suitable alternative employment. If a claimant is able to demonstrate he is unable to return to his former job, then the employer has the burden of production to show that suitable alternate employment is available. *Nguyen v. Ebbside Fabricators*, 19 BRBS 142 (1986). The availability of suitable alternative employment involves defining the type of jobs the injured worker is reasonably capable of performing, considering his age, education, work experience and physical restrictions, and determining whether such jobs are reasonably available in the local community. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1978); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The showing of available suitable alternative employment may not be applied retroactively to the date of maximum medical improvement. An injured worker's total disability becomes partial on the earliest date that the employer shows suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70 (2d Cir. 1991) and *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

Counsel for the Employer presented two factors to support the assertion that Mr. Stamper has not completely lost his ability to earn an income due to his back injury. First, following his back surgeries in 1997 and 1998, Gulf Marine brought Mr. Stamper back to work from March 1999 through March of 2000. Although his salary no longer matched his pre-injury wages, Mr. Stamper was still able to earn nearly \$12,000 a year. Second, and in the alternative, Mr. Stamper remained capable of earning an income because sufficient suitable alternative employment was available to Mr. Stamper in the local area, including work as a security guard.

¹⁸Instead, the Employer believes Mr. Stamper is not totally disabled because in economic terms, despite the back injury, he retains a residual earning capacity.

Gulf Marine Re-employment

Addressing first Mr. Stamper's re-employment at Gulf Marine, there is no requirement that a claimant be bedridden for there to be a finding of total disability. *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied* 394 U.S. 976 (1969). The fact that a claimant works after his injury does not necessarily preclude a finding of total disability. *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). Such a finding is possible where the post-injury employment is "sheltered employment;" that is, the employment is solely at the benevolence of the employer. *Walker v. Pacific Architects & Eng'ers*, 1 BRBS 145, 147-8 (1974). Sheltered employment exists where the wage is not justified by the work; the work performed is of little benefit to the employer and does not involve necessary work; and, the employee would not necessarily be replaced if no longer working there. *Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982). In contrast, light duty work which is necessary and profitable for the employer, where the injured employee would be replaced if no longer employed is not considered "sheltered." See *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). Sheltered employment is insufficient to establish suitable alternative employment, or residual earning capacity. See *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

When Gulf Marine re-hired Mr. Stamper in 1999, the company gave him a few assignments that he usually completed although with some physical problems. Eventually, Mr. Rubin came up with the back gate guard position. Mr. Rubin explained the purpose of the job was to get Mr. Stamper back into the company's workforce and Mr. Strickland observed such light duty work at the company usually helped an injured employee retained associated employment benefits. As a back gate guard, Mr. Stamper on occasion stopped unauthorized individuals from entering the back gate and redirected them to the front gate.

On the other hand, several factors support characterizing Mr. Stamper's work at Gulf Marine as sheltered employment. First, Mr. Rubin acknowledged the job was created just for Mr. Stamper, even though Gulf Marine already employed another company for its plant's security.¹⁹ The company did not advertise the opening, and at the time Mr. Rubin was faced with finding a job for Mr. Stamper, the company did not have a back gate guard or a back gate guard shack. In addition, while Mr. Rubin and Mr. Strickland expressed altruistic reasons for keeping Mr. Stamper on the payroll, his employment for only 32 hours a week clearly suggests that another motive behind Gulf Marine's re-employment of Mr. Stamper was to meet its insurance contract obligation of furnishing Mr. Stamper two-thirds of his pre-injury wages. Next, while Mr. Rubin indicates the job was temporary with the intention to apparently rehabilitate Mr. Stamper, Gulf Marine laid off Mr. Stamper in the early part of 2000 and never called him back to work. Finally, according to Mr. Stamper, he spent almost all of his time at the back gate doing nothing and

¹⁹There was some conflicting testimony in this regard since Mr. Strickland testified that the position had been previously filled by another light duty employee. Since Mr. Rubin was directly involved in Mr. Stamper's assignment, I consider his testimony more probative.

being essentially non-productive. Though he did redirect a few people to the front gate, that service apparently did not have much value to Gulf Marine because the company saw no need for it prior to Mr. Stamper's assignment.

Upon considering all the information associated with the back gate guard job, I find that the preponderance of the evidence demonstrates that Gulf Marine was acting as a beneficent employer when it re-employed Mr. Stamper as a back gate guard. While the company's initial efforts to find work at its plant for Mr. Stamper may have reflected a *bona fide* rehabilitation intention, Mr. Rubin's eventual decision to sit Mr. Stamper down at the back gate for 32 hours a week essentially doing nothing changed the nature of company's efforts. I recognize and understand (especially considering the videotape showing Mr. Stamper working on a truck) the frustration of Mr. Stamper's supervisor with his pain complaints when he was assigned real work. Yet, when confronted with Mr. Stamper's pain complaints, the next step in the process might have included a specific functional capability recommendation from Dr. DeWeese, further pain management rehabilitation or a psychological evaluation of the validity of Mr. Stamper's pain complaints. Instead, Gulf Marine choose to met its insurance contract requirements by giving Mr. Stamper the gift of employment as a back gate guard. That employment decision may or may not have been laudable. Regardless, I conclude Mr. Stamper's work as a back gate guard provided little productive benefit to Gulf Marine, did not involve necessary work for Gulf Marine and did not justify his hourly wage of \$7.60. As a result, Mr. Stamper's re-employment with Gulf Marine in 1999 and part of 2000 as a back gate guard was sheltered employment, which did not realistically reflect his post-injury earning capacity and does not establish suitable alternative employment.

Local Job Market

In determining whether suitable alternative employment exists for Mr. Stamper in his local area, I am guided by a two part test. First, considering Mr. Stamper's age, education, work experience, intellect, and physical restrictions, I must determine his employment capabilities, in terms of physical and mental abilities. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 103, 1042 (5th Cir. 1981). Second, within the category of jobs Mr. Stamper is reasonably physically and mentally capable of performing, I must determine whether such jobs are reasonably available in his local community. *Id.* and *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993), *cert. denied* 114 S.Ct. 1539 (1994). Since the job opportunities must be realistic, Gulf Marine has to establish the precise nature and terms of the employment. *Reich v. Tractor Maine, Inc.*, 16 BRBS 272 (1984).

Employment Capability - Physical

In the area of physical capability, three individuals have presented their opinions.²⁰ At the hearing, Mr. Stamper testified that he has a problem sitting too long because his feet fall asleep. He can not climb and the pain in his back, tail bone, and legs remains at the same level he experienced prior to his back surgeries. In the early part of 1999, Mr. Stamper also reported to Dr. Cutler that he experienced weakness in his legs, could not stand or walk normally; and, generally could do nothing but lie flat on his back.

In March 1999, Dr. Cutler completed a work restrictions chart (JX 2). In the doctor's opinion, Mr. Stamper can lift and carry up to 20 pounds, bend squat and climb occasionally, use his hands and feet repetitively, and drive an automatic transmission vehicle. At the same time, Mr. Stamper is prohibited from crawling, working with moving machinery or in an environment subject to "marked" changes in temperature and humidity. Significantly, Dr. Cutler also restricted Mr. Stamper to no more than one continuous hour of each activity involving sitting, standing or walking.

Dr. Williams agrees Mr. Stamper is physically capable of only light duty. However, based on his interpretation of Dr. Cutler's work restrictions chart, Dr. Williams opines Mr. Stamper is limited to no more than three hours of work each day since the most he can sit, stand or walk at work is one hour for each activity. As a result, Mr. Stamper, at best, is physically capable of working only part-time, three hours a day.²¹

Due to the apparent conflict between these opinions, I must first assess their relative probative weight. In that regard, I consider Mr. Stamper's personal evaluation the least reliable evaluation. While Mr. Stamper is certainly in the best position to know his own physical capabilities, Mr. Stamper's truck repair activities displayed on the February 1999 videotape, coupled with Dr. Cutler's observation that Mr. Stamper's subjective complaints are inconsistent with the activities demonstrated on the videotape, diminish the probative value of Mr. Stamper's subjective assessment.

²⁰Based on his evaluation of Mr. Stamper, Dr. DeWeese was in an excellent position to provide a fourth assessment. Unfortunately, in the absence of his deposition, I am left with his terse observation that additional surgery would not move Mr. Stamper to a higher functional work status. That comment is not particularly probative because Dr. DeWeese does not explain what level of work he is using for comparison or the basis for his conclusion.

²¹Although Dr. Williams stated the Mr. Stamper was blind in the left eye, I have not given much weight to that assessment. The testimony of Mr. Stamper and his family member does indicate Mr. Stamper has problems with his left eye. But, there is no medical evidence on the degree of his sight impairment. Likewise, although Mr. Stamper has a restrictive driver's license that requires the use of side mirrors, the extent of the vision problem is not established. Despite any eyesight problem, Mr. Stamper ran track in school, played pool and bowled before his injury, and had worked successfully as both a sand blaster helper and ship repair yard laborer. In any event, Dr. Williams also acknowledged the eyesight problem was not much of a physical factor in comparison to the work limitation due to Mr. Stamper's bad back.

I have considered the possibility that the videotape is not an accurate reflection of Mr. Stamper's usual physical capabilities. I understand his need for transportation to work at Gulf Marine, a broken truck starter, and a lack of funds for a repairman, may have forced him into the situation where he had little choice but to repair the truck. However, that explanation also carries an implicit assumption that Mr. Stamper is a particularly unlucky claimant because on the one occasion that he had to engage in an atypical physical activity, the employer's representative just happened to be present to videotape the action. An alternate, and just as probable, explanation is that the videotape fairly captures the physical capabilities of Mr. Stamper after his back injury and subsequent surgeries. In choosing between these two possible realities, I turn to Dr. Cutler, as Mr. Stamper's treating physician, who was in the best position to assess whether Mr. Stamper's subjective complaints actually established the range of his physical capabilities in light of the film. As noted by Dr. Cutler, Mr. Stamper's extensive subjective complaints included leg weakness, a tendency to collapse, an inability to stand, an inability to walk normally without limping or hunching forward, and a general physical condition of being able to do nothing other than lie flat. Mr. Stamper displayed almost none of those infirmities on the day he fixed the truck.²²

Next, Dr. Williams presented a well-documented opinion on Mr. Stamper's physical ability to return to work, having evaluated Mr. Stamper, reviewed his medical records, including Dr. Cutler's reports, and observed the videotape. However, for three reasons, I give his opinion on this subject less relative probative weight than Dr. Cutler's also well-documented opinion.

First, although Dr. Williams specializes in rehabilitation, he is not a medical doctor. Consequently, I place more reliance on Dr. Cutler, as a board certified orthopaedic specialist, to assess the physical consequences and work limitations associated with Mr. Stamper's back injury and residual pain.

Second, and most important, Dr. Williams' three hour work day restriction for Mr. Stamper is based on his interpretation of Dr. Cutler's work restriction chart that is somewhat inconsistent with the chart and clearly at odds with Dr. Cutler's own assessment of the restrictions he placed on the chart. Paragraph 1 of the Descriptive Restrictions Chart (JX 2) states "In an 8 hour work day, the patient can: (circle hours anticipated for each activity without interruptions)." Thus, the question appears to ask for continuous time without a break rather than maximum time an individual may endure during an 8 hour day. Even if the form's question is not completely clear, Dr. Cutler did not limit Mr. Stamper to a three hour work day as he reviewed the chart. Rather in his deposition, Dr. Cutler specifically approved the job of security guard which required between four to six hours of walking.

²²I also accept Dr. Cutler's medical opinion that Mr. Stamper's ability to move about as shown on the tape was due neither to medication nor steroid injections. Finally, I note that according to Dr. DeWeese, in May 1999 Mr. Stamper reported that he was even unable to bend over. Yet, on the day of the truck repair in February 1999, Mr. Stamper repeatedly performed that maneuver without any apparent hesitation or stress.

Third, I find Dr. Williams's statement that the videotape was not significant not to be well reasoned. Noting that Mr. Stamper is not a cripple, Dr. Williams seemed to dismiss the tape by stating it showed only one hour of activity and did not demonstrate that he could work full time. As noted in my summarization of the tape, it captured much more than one hour of activity. Mr. Stamper was on the go the morning of February 12, 1999 and the starting at noon, he spent the next hour and a half working on a truck.

In comparison Dr. Cutler presented both an extensively documented and well reasoned medical opinion on Mr. Stamper's physical work capacity. He based his conclusions on extensive medical evidence, including multiple examinations, treatments, and tests, such as CT scans and myelograms which establish that despite two back surgeries, Mr. Stamper continues to have an abnormal and impaired back. Additionally, in light of his review of the videotape, and considering his expertise, Dr. Cutler best integrated all of the evidence in the record in a well reasoned manner. As a result, I consider his opinion to be the most probative assessment of Mr. Stamper's physical capacity for work.

Accordingly, in light of Dr. Cutler's most probative assessment, I find Mr. Stamper is physically able to work full time. The job may not require any lifting over 20 pounds or crawling. In addition, the employment must give Mr. Stamper the flexibility to sit, stand, or walk so that he engages in such activity for no more than one continuous hour without a break.

Employment Capability - Mental

As the case law points out, in addition to physical capacity to work, a claimant's education and mental skills are relevant factors for the determination of re-employment. In the record, only two individuals address Mr. Stamper's mental faculties for work.

In developing her labor market surveys, Ms. Manning knew Mr. Stamper only completed ninth grade. She also recognized his limited language ability and rated his reasoning, math and language skills at the low end of a scale of one to six. Based on his work history, Ms. Manning expected Mr. Stamper would learn necessary skills through up to three months on-the-job training. Consequently, she assembled a list of jobs that offered training and did not require a high school education or a GED.

Dr. Williams took a significantly more documented approach and reached a drastically different conclusion. After meeting with Mr. Stamper and conducting mental skills tests, he concluded Mr. Stamper possessed mental abilities well below the ninth grade level. Mr. Stamper reads at the first grade level and would be unable to pass licensing tests or even complete job applications. Characterizing Mr. Stamper as mentally retarded, Dr. Williams believed he was not adaptable to a work environment, could not accomplish multiple activities, operated at a slow pace, and was unable to relate to people. While prior to his injury, Mr. Stamper had obtained work as a physical laborer, his post-injury physical limitations, coupled with the educational deficits, made Mr. Stamper unemployable.

Again, first considering the relative probative weight of these two assessments, I find both opinions suffer some loss of probative value. The obvious, and more significant, problem with Ms. Manning's opinion is the lack of a documented assessment of Mr. Stamper's skills. Although Ms. Manning recognized Mr. Stamper's mental and education levels were limiting factors, she did not thoroughly, or accurately, establish those parameters. Consequently, her implied opinion that Mr. Stamper could handle a job that provided training and did not require a high school education is not well documented and has diminished probative value.

Dr. Williams presented a conclusion about Mr. Stamper mental ability for work based on extensive documentation, an interview, and testing. Yet, while better documented than Ms. Manning's assessment, his opinion also has diminished probative value due to reasoning shortfalls. In particular, Dr. Williams first declares that Mr. Stamper is essentially unemployable principally because his post-injury physical limitations now bring his diminished mental skills into critical focus. Then, later Dr. Williams opined that Mr. Stamper, even in his present condition, mentally and physically, may find periodic employment that would allow him to earn several thousand dollars a year. Also, Dr. Williams did not reconcile very well his generalized opinion that Mr. Stamper's mental retardation renders him unemployable with his conclusion that Mr. Stamper has the mental capacity to work low-end semi-skilled and unskilled, repetitive jobs.²³ Likewise, Dr. Williams did not explain how his opinion about the adverse effect of Mr. Stamper's mental deficiencies related to Mr. Stamper's past work history, other evidence in the record, and the videotape. Despite his mental deficiencies, Mr. Stamper obtained a job with Gulf Marine and successfully worked and adapted to the demanding environment of a ship repair yard. Notably, although nicknamed "Forrest Gump," Mr. Stamper was able to accomplish any assigned task. According to his family, and even Mr. Rubin, Mr. Stamper was a reliable worker. Finally, both his brother's testimony and the videotape demonstrate that Mr. Stamper can relate to people and is mechanically inclined to the degree that he can repair a truck.

For the reasons noted above, I have insufficient confidence in Dr. Williams' reasoning to accept his dire assessment of Mr. Stamper's employment limitations based on mental ability. At the same time, considering the objective testing evidence developed by Dr. Williams, I do find his conclusion about the level of Mr. Stamper's literacy to be better documented and more probative than Ms. Manning's assumption that Mr. Stamper's mental deficiency amounts to only the lack of a high school diploma. Consequently, although Mr. Stamper attended school through the ninth grade, I find Mr. Stamper has first grade level reading and writing ability and elementary math skills.

²³Dr. Williams' testimony also contained an inconsistency and an undocumented overstatement that raises a concern about his objectivity. Early on in his deposition, Dr. Williams characterized Mr. Stamper as a cripple. Yet, when called upon to discuss his observation of the videotape, Dr. Williams dismissed the significance of the filmed activities by indicating the tape proved nothing since Mr. Stamper was not a cripple. Then later, without much foundation, Dr. Williams declared Mr. Stamper would face stiff competition in obtaining that one in 25,000 job that was suitable for him.

Employment Capability - Summary

Based on Dr. Cutler's probative medical assessment and Dr. Williams' testing, I conclude Mr. Stamper is capable of performing light physical effort work for an eight hour work day that entails no crawling or lifting over twenty pounds. Further, the job must permit Mr. Stamper the flexibility to sit, stand, and walk as necessary to ensure that he does not engage in any one of those three physical activities for more than one continuous hour. If the job involves any qualification beyond physical effort, or training, the qualification or training must require no more than a first grade reading and writing skill level and rudimentary math skills.

Job Opportunities

Having determined the extent of Mr. Stamper's employment capabilities, I now must assess whether the Employer has met its burden of production to establish the existence of job opportunities in the local job market that Mr. Stamper has the capability of performing. In effort to demonstrate such employment, the Employer has submitted several labor market surveys prepared by Ms. Manning (EX 2).

In reviewing the job listings, I note, as pointed out by both Dr. Williams and argued by counsel for the Claimant, the surveys stem from a computer search of the state of Florida job bank and contain very little information about the listed positions. The listing for each job sets out the job title, job number, requirements, duties, and salaries. Of those categories, the duties section is the most informative but still contains only a terse one line description. While some of the jobs do list as a requirement some degree of physical capability (good manual dexterity - assembler; and, ability to stand for long periods - packager) or mental acuity (filing ability - mail room job; and, read and write English - cashier), most of the requirement sections list "none."

Given the significant physical limitation from Dr. Cutler of no more than one continuous hour of sitting, standing, or walking, determining the appropriateness of each job for Mr. Stamper in physical terms is very difficult. In light of his work restrictions, Dr. Cutler believed Mr. Stamper was physically capable of working as a delivery driver, machine operator, parking garage cashier, security guard, machine operator, and solderer.²⁴ However, his analysis of the job surveys demonstrated the problem associated determining whether Mr. Stamper is capable of performing the described work. For example, due to the lack of information in the listing, Dr. Cutler expressed concern that the job of assembler might not give Mr. Stamper the requisite flexibility to alternate between sitting, standing, and walking.

²⁴When Ms. Manning developed the labor market surveys, she was not aware of Dr. Cutler's one hour restriction relating to continuous sitting, standing and walking. Subsequently, Dr. Cutler actually reviewed the job surveys, added that constraint, and then expressed concern that the assembler job was inappropriate because Mr. Stamper would be unable to alter his position.

As another example, Dr. Cutler approved the job of solderer which reads as follows:

Job Title: Solderer

Job #: 1992115

Requirements: Must prove I9 info

Duties: Solder of circuit boards and assembly.

Salary: \$13,832

Since that job description provides no information on the physical parameters of the solderer's work, Dr. Cutler apparently approved the job on the assumption that Mr. Stamper would be able to sit, stand, and even walk as a solderer. That type of assumption exists in his approval of the other jobs too.²⁵

Given the dearth of information in the Florida job listings, Dr. Cutler had to rely, in part, on assumptions about the physical requirements of the work to render his approval of several jobs for Mr. Stamper, including delivery driver, machine operator, parking garage cashier, security guard, machine operator, and solderer. While Dr. Cutler's reliance on such assumptions was arguably reasonable, the Employer had a burden of production to present sufficient detail of each job's physical aspects to permit an objective assessment of its suitability by Dr. Cutler - without assumptions. In the absence of a detailed description of the physical work associated with each job, Dr. Cutler was not in a position to make a probative determination of its suitability for Mr. Stamper.

Likewise, in light of Mr. Stamper's unique physical constraints due to his back injury, and the lack of detail as to physical components of the job listings, I am unable to make a finding that any of the jobs in the labor market surveys are physically suitable for Mr. Stamper. Consequently, Ms. Manning's labor market surveys fall short of demonstrating the presence of physically suitable job opportunities in the Tampa area for Mr. Stamper.

Even if I were to rely on Dr. Cutler's approval of the five jobs as evidence of suitable alternative employment in terms of physical capacity, his approval still fails to establish suitable alternative employment because, as Dr. Cutler acknowledged, he only focused on Mr. Stamper's physical limitations and did not factor in any mental or educational deficiencies. Consequently, I would still have to determine whether Mr. Stamper also had the mental capacity for those positions. At that point, the lack of information in the job listings about mental requirements becomes problematic.

²⁵The questions presented to Dr. Cutler about the suitability of various jobs contained numerous assumptions, which are not in evidence (deposition pages 16 to 20). As an example, Employer's counsel asked about the job of delivery driver by stating, "Assume that he may have to sit up four to six hours, stand not at all, walk occasionally, reaching frequently, climbing occasionally, bending occasionally, mostly getting in and out of the truck."

While many of the surveys do list some mental skills, such as the ability to read and write English as a requirement, others job positions list “none” in the requirements section even when the job title and description imply the need for literacy. For instance, the position of restaurant host lists no requirements but indicates the employee must “greet and seat guest, answer phone, take messages, make reservations.” As result, I consider the job title, requirement section, and brief duty description in the Florida job listings set out in the Employer’s labor market surveys, absent any additional information, insufficient to determine whether Mr. Stamper, with his first grade level literacy and rudimentary math skills, is mentally capable of being trained for, and accomplishing, the described work.²⁶

In summary, since the labor market surveys provide insufficient detail to determine the suitability of employment for Mr. Stamper considering his physical and mental constraints, Gulf Marine has failed to establish the presence suitable alternative employment in the local job market.

Conclusion

Mr. Stamper has established a *prima facie* case of total disability. Neither Mr. Stamper’s sheltered employment with Gulf Marine following his recovery from his back surgeries, nor the brief job descriptions in the labor market surveys establish the existence of suitable alternative employment.²⁷ In the absence of suitable alternative employment, Mr. Stamper does not have a residual earning capacity and his loss of income due to his permanent physical impairment from the March 15, 1997 work-related accident is total. Accordingly, Mr. Stamper’s claim for permanent total disability compensation must be approved.

ATTORNEY FEE

Section 28 of the Act, 33. U.S.C. § 928, permits the recoupment of a claimant’s attorney’s fees and costs in the event of a “successful prosecution.” Since I have determined an issue in favor of Mr. Stamper, both Mr. Calafell and Mr. Barnett are entitled to submit a petition to recoup fees and costs

²⁶Even without further information on mental requirements, most of Dr. Cutler’s findings on job suitability are no longer appropriate when Mr. Stamper’s mental ability is added as a consideration. The job of delivery driver is not realistically available to Mr. Stamper because he is almost illiterate. The job listings for machine operator required the ability to do simple math, or the ability to read and write. Lacking the ability to do more than fundamental math, Mr. Stamper appears unqualified for the position of parking garage cashier. Finally, according to both Ms. Manning and Mr. Stamper, security guard work may require the passage of a special licensing examination. Other security positions required the ability to prepare a “detailed report.”

²⁷Because the Employer failed to meet its burden of production in demonstrating the existence of suitable alternative employment, I need not address the third step in the total disability adjudication process of deciding whether Mr. Stamper proved he was unemployable because employment was actually not available. *See Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP*, 784 F. 2d 687 (5th Cir. 986), *cert. denied*, 479 U.S. 826 (1986); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981) *rev’g* 5 BRBS 418 (1977); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

associated with their professional work before the Office of Administrative Law Judges. Since Mr. Stamper has been represented by two attorneys over the course of this adjudication, Mr. Calafell and Mr. Barnett should address the respective contributions counsel may have made in the successful prosecution of Mr. Stamper's claim. Counsel have thirty days from receipt of this decision and order to file an application for attorney fees and costs as specified in 20 C.F.R. § 702.132 (a). Mr. Smith has ten days from receipt of such fee applications to file an objection to the requests.

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer, GULF MARINE REPAIR CORP., shall pay the Claimant, Mr. CARL STAMPER, compensation for **PERMANENT TOTAL DISABILITY**, due to an injury to his back on March 15, 1997, from March 4, 1999 and continuing, based on an average weekly wage of \$349.60, such compensation to be computed in accordance with Section 8 (a) of the Act, 33 U.S.C. § 908 (a).

2. The Employer, GULF MARINE REPAIR CORP., shall receive credit for all amounts of compensation previously paid to the Claimant, Mr. CARL STAMPER, as a result of the back injury on March 15, 1997.²⁸

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: January 10, 2002
Washington, D.C.

²⁸Note: When an employer continues a claimant's regular salary during his period of disability, the employer will not receive a credit unless it can show the payments were intended as advance payments of compensation. See *Argonaut Ins. Co. v. Patterson*, 846 F. 2d 715, 723 (11th Cir. 1988) and *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388, 396 (1978).